

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES AUTOMOBILE) (
ASSOCIATION) (CIVIL ACTION NO.
VS.) (2:18-CV-245-JRG
WELLS FARGO BANK, N.A.) (MARSHALL, TEXAS
NOVEMBER 5, 2019
8:32 A.M.

TRANSCRIPT OF JURY TRIAL

MORNING SESSION

BEFORE THE HONORABLE CHIEF JUDGE RODNEY GILSTRAP,

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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34
35 (Proceedings recorded by mechanical stenography, transcript
36 produced on a CAT system.)

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38

1 P R O C E E D I N G S

08:32:15

2 (Jury out.)

08:33:07

3 COURT SECURITY OFFICER: All rise.

08:33:10

4 THE COURT: Be seated, please.

08:34:03

5 MR. SHEASBY: Your Honor, one of our associates

08:34:05

6 just had to run out to the bathroom. May I please get him

08:34:09

7 and bring him right back?

08:34:10

8 THE COURT: Do we need him to read the items from
9 the list of pre-admitted exhibits into the record?

08:34:16

10 MR. SHEASBY: Yes.

08:34:16

11 THE COURT: Is that who you had lined up to do

08:34:18

12 that?

08:34:18

13 MR. SHEASBY: No, Your Honor. He's at -- it's
14 Mr. Rowles, I want him to be here for the jury. I'm going
15 to go get him right now.

08:34:25

16 THE COURT: Well, I'll wait to bring the jury in
17 if he's not back. Have a seat, Mr. Sheasby.

08:34:30

18 Are the parties prepared to read into the record
19 the items from the list of the pre-admitted exhibits used
20 during yesterday's portion of the trial?

08:34:39

21 MR. BUNT: Yes, Your Honor.

08:34:39

22 THE COURT: Please proceed.

08:34:40

23 MR. BUNT: Yesterday, Your Honor, the following
24 exhibits were used: Plaintiff's Exhibit No. 22, PX-94,
25 PX-438, PX-1182, there were also impeachment exhibits,

08:35:03 1 ix-0037, ix-0038, ix-0045, ix-0052, ix-0053, and ix-0073,
08:35:18 2 and then there were some Defense Exhibits but I'll let
08:35:22 3 Mr. Underwood read those in.

08:35:24 4 THE COURT: All right. Do Defendants have any
08:35:26 5 objection to the rendition just offered by the Plaintiff?

08:35:30 6 MR. UNDERWOOD: We do not, Your Honor.

08:35:31 7 THE COURT: Do you have a similar rendition,
08:35:34 8 Mr. Underwood?

08:35:34 9 MR. UNDERWOOD: We do. We have DTX-001, DTX-003,
08:35:39 10 DTX-381, and DTX-613.

08:35:44 11 THE COURT: Any objection to that, Mr. Bunt, for
08:35:48 12 Plaintiff?

08:35:48 13 MR. BUNT: No, Your Honor.

08:35:54 14 MR. HILL: Your Honor, may I inquire of just one
08:35:56 15 issue, and it's just lack of clarity on my part.

08:36:00 16 Mr. Bunt read in the impeachment exhibits that
08:36:05 17 were used yesterday. I assume those are not being offered
08:36:07 18 into the record as substantive evidence. They're just
08:36:09 19 being identified as having been used.

08:36:09 20 THE COURT: I would assume that's true.

08:36:12 21 MR. BUNT: I was actually offering them in as
08:36:14 22 evidence for the record, Your Honor. They were published
08:36:16 23 to the jury, I believe, all of them were published to the
08:36:20 24 jury yesterday.

08:36:20 25 THE COURT: Well, to the extent they were

08:36:21 1 published to the jury and there was dialog between counsel
08:36:28 2 and the witness, then that dialog is part of the transcript
08:36:31 3 and in the record.

08:36:41 4 MR. BUNT: And with respect to the ix-37, 38, 45,
08:36:47 5 52 and 53, they were established as business records for
08:36:48 6 Mitek and they were certainly authenticated, as well.

08:36:51 7 THE COURT: Well, it's never been the Court's
08:36:56 8 practice to include in this type of running record in
08:37:00 9 the -- or running accounting in the record of items from
08:37:05 10 the list of pre-admitted exhibits items that were not on
08:37:10 11 the list of pre-admitted exhibits that were used for
08:37:13 12 impeachment purposes only. The purpose of this rendition
08:37:15 13 into the record each morning is to clarify in the record
08:37:19 14 what comes from the list that we took up during pre-trial
08:37:23 15 and the Court considered as to admissibility and designated
08:37:26 16 as pre-admitted exhibits from those that were actually used
08:37:30 17 during the trial before the jury and are a part of the
08:37:33 18 evidence they are to consider and admitted exhibits for
08:37:38 19 purposes of the trial.

08:37:38 20 I'm not going to -- I'm not going to change that
08:37:45 21 process to add impeachment exhibits that weren't considered
08:37:50 22 as a part of pre-trial, were not a part of the list of
08:37:53 23 pre-admitted exhibits that's been drawn from to be
08:37:57 24 identified by these renditions every morning before I bring
08:38:00 25 the jury in.

08:38:01 1 To the extent they were used during the trial
08:38:03 2 before the jury, the colloquies between Plaintiff --
08:38:09 3 between counsel and the witness are clearly in the record
08:38:12 4 as part of the transcript. There's never an offer of the
08:38:19 5 impeachment document for admission when it's used. And I
08:38:23 6 don't consider it to be a part of the record evidence in
08:38:28 7 the case.

08:38:29 8 MR. BUNT: Thank you, Your Honor. I understand
08:38:30 9 your ruling.

08:38:31 10 THE COURT: Okay. All right.

08:38:32 11 MR. HILL: Thank you, Your Honor.

08:38:33 12 THE COURT: All right. We ended yesterday with
08:39:28 13 Ms. Lockwood-Stein. Are Defendants prepared to call their
08:39:33 14 next witness?

08:39:33 15 MR. MELSHEIMER: We are so prepared, Your Honor.

08:39:35 16 THE COURT: All right. Then let's bring in the
08:39:37 17 jury, Mr. Johnston.

08:40:04 18 COURT SECURITY OFFICER: All rise.

08:40:05 19 (Jury in.)

08:40:06 20 THE COURT: Good morning, and welcome back.
08:40:18 21 Please have a seat.

08:40:19 22 Defendant, call your next witness.

08:40:29 23 MR. MELSHEIMER: May it please the Court, Your
08:40:34 24 Honor. At this time Wells Fargo calls Mr. Chris Gerardi.

08:40:38 25 THE COURT: All right. Mr. Gerardi, if you'll

08:40:41 1 come forward and be sworn.

08:40:50 2 (Witness sworn.)

08:40:50 3 THE COURT: Please come around, sir, have a seat

08:41:00 4 at the witness stand.

08:41:01 5 Do you have binders to distribute, Ms. Williams?

08:41:07 6 MS. WILLIAMS: Yes, Your Honor, I do.

08:41:09 7 THE COURT: You have leave to distribute them.

08:41:12 8 MS. WILLIAMS: Thank you, Your Honor.

08:41:32 9 THE WITNESS: Thank you.

08:41:34 10 MS. WILLIAMS: Thank you.

08:41:44 11 THE COURT: All right. Counsel, you may proceed

08:41:45 12 with your direct examination of the witness when you're

08:41:48 13 ready.

08:41:48 14 MS. WILLIAMS: Thank you, Your Honor. May it

08:41:48 15 please the Court.

08:41:48 16 CHRIS GERARDI, DEFENDANT'S WITNESS, SWORN

08:41:48 17 DIRECT EXAMINATION

08:41:50 18 BY MS. WILLIAMS:

08:41:50 19 Q. Good morning.

08:41:52 20 A. Good morning.

08:41:52 21 Q. Will you please introduce yourself to the jury?

08:41:54 22 A. Sure. I'm Chris Gerardi.

08:41:57 23 Q. Mr. Gerardi, what is your role in this case?

08:41:59 24 A. I've been asked to provide my opinion on the economic

08:42:02 25 damages should USAA prevail on its claims in this matter of

08:42:06 1 infringement.

08:42:07 2 Q. Did you prepare slides for us today to help illustrate
08:42:11 3 your opinions?

08:42:12 4 A. Yes, I did.

08:42:13 5 Q. Now, let's talk about what qualifies you to render
08:42:17 6 opinions in this case.

08:42:18 7 Will you please tell us what you do and where
08:42:20 8 you've worked?

08:42:21 9 A. Sure. Currently I'm a vice president with a company
08:42:25 10 called Charles River Associates. We're an economic
08:42:28 11 consulting firm. I provide a variety of economic,
08:42:33 12 financial, and accounting services to clients. Prior to
08:42:35 13 Charles River Associates I was a senior managing director
08:42:38 14 at FTI Consulting for 16 years where I co-led the firm's
08:42:43 15 disputes in intellectual property practice. And prior to
08:42:46 16 that I was a partner at KPMG, which is one of the world's
08:42:50 17 largest accounting and advisory services groups.

08:42:53 18 Q. Now, before all of that experience, did you go to
08:42:56 19 school?

08:42:56 20 A. Yes, I did.

08:42:57 21 Q. Will you please tell us where you went to school?

08:42:59 22 A. Sure. I have my Bachelor's degree in economics from
08:43:02 23 University of Massachusetts at Dartmouth, and I have a
08:43:06 24 Master's degree in banking finance and money management
08:43:08 25 from Adelphi University which is a small school up in New

08:43:14 1 York.

08:43:14 2 Q. During the course of your career, have you had
08:43:16 3 experience in calculating damages in patent cases like this
08:43:19 4 one?

08:43:19 5 A. Yes, I have. Over my career, I've worked on north of
08:43:24 6 75 patent matters involving a variety of different
08:43:28 7 industries working both for the Plaintiffs and Defendants.

08:43:31 8 THE COURT: Just a minute, folks. Mr. Gerardi,
08:43:33 9 you're going to have to slow down, and Ms. Williams, you're
08:43:36 10 going to have to slow down. Okay?

08:43:39 11 MS. WILLIAMS: Yes, Your Honor.

08:43:39 12 THE WITNESS: Yes, Your Honor.

08:43:40 13 THE COURT: All right. Let's proceed on that
08:43:43 14 basis.

08:43:44 15 Q. (By Ms. Williams) Have any of those matters involved
08:43:45 16 the banking industry?

08:43:46 17 A. Yes, they have, several.

08:43:48 18 Q. Would you please describe that a little bit for the
08:43:49 19 jury?

08:43:49 20 A. Sure. So I worked on matters for Chase, Bank of
08:43:53 21 America, HSBC, Citibank, to name a few.

08:43:59 22 Q. Has your -- has your work of your career involved
08:44:02 23 assisting companies in valuing intellectual property, like
08:44:06 24 patents and licensing those patents?

08:44:07 25 A. Yes. So outside of the context of litigation, I've

08:44:15 1 helped clients who are looking to monetize their
08:44:18 2 intellectual property. I've helped them evaluate markets,
08:44:20 3 I've helped them evaluate and edit their financial
08:44:23 4 licensees and I've helped those clients evaluate what the
08:44:28 5 economics of those licenses may be if they were to enter
08:44:31 6 into some type of a licensing negotiation.

08:44:34 7 Q. Have you been qualified as a damages expert previously?

08:44:37 8 A. Yes. I've testified in federal court, state court, and
08:44:43 9 international arbitrations for the work that I've done.

08:44:46 10 Q. Is your -- is FTI being compensated for the work that
08:44:49 11 you have done on this case?

08:44:50 12 A. Yes, they are.

08:44:51 13 Q. What is the rate at which FTI is being compensated?

08:44:55 14 A. Approximately \$725.00 per hour.

08:45:00 15 Q. How many hours have you spent on this case?

08:45:02 16 A. Approximately 170, 175 hours.

08:45:06 17 Q. Does your work -- does FTI's compensation in this case
08:45:10 18 depend on the outcome in any way?

08:45:12 19 A. No, it does not.

08:45:16 20 MS. WILLIAMS: Your Honor, we offer Mr. Gerardi as
08:45:19 21 an expert on the valuation of intellectual property and the
08:45:21 22 calculation of patent damages.

08:45:22 23 THE COURT: Is there objection?

08:45:23 24 MR. SHEASBY: No objection, Your Honor.

08:45:24 25 THE COURT: Then Court will recognize this witness

08:45:27 1 as an expert in the designated fields.

08:45:29 2 Please continue.

08:45:30 3 MS. WILLIAMS: Thank you, Your Honor.

08:45:31 4 Q. (By Ms. Williams) Mr. Gerardi, let's turn to the work

08:45:33 5 that you did in this case.

08:45:34 6 What were you asked to do?

08:45:35 7 A. Three tasks. One is to provide my own opinion -- my

08:45:44 8 affirmative opinion of what the damages would be in this

08:45:46 9 case for the claims at issue.

08:45:48 10 Second, was to provide my perspective of -- of the

08:45:55 11 positions presented by Mr. Weinstein, who you heard from

08:45:59 12 previously.

08:45:59 13 And, third, to provide some perspective of the

08:46:03 14 damages related aspects of Mr. Calman's testimony, as well.

08:46:06 15 Q. Are you here to provide any opinion on infringement to

08:46:08 16 this jury?

08:46:09 17 A. No, not at all.

08:46:10 18 Q. To be clear, you don't have any opinion on whether

08:46:13 19 Wells Fargo infringes USAA's patents?

08:46:16 20 A. No, I do not.

08:46:20 21 Q. And you don't have any opinion as to whether Wells

08:46:24 22 Fargo's Mobile Deposit product does the specific USAA form

08:46:26 23 of auto capture?

08:46:27 24 A. No, I do not.

08:46:28 25 Q. And by providing your testimony to the jury today, are

08:46:31 1 you suggesting in any way that Wells Fargo owes money to
08:46:33 2 USAA?

08:46:34 3 A. No, I am not.

08:46:36 4 Q. What materials did you consider in forming your
08:46:42 5 opinion?

08:46:42 6 A. So I reviewed a number of documents produced by both
08:46:48 7 USAA and Wells Fargo.

08:46:51 8 Q. And on this slide, do we see a listing of that
08:46:54 9 information?

08:46:54 10 A. Yes, on the left-hand side of that slide.

08:46:57 11 Q. Would you just highlight some of that information for
08:46:59 12 the jury?

08:47:00 13 A. Sure. So the documents produced by the parties, the
08:47:03 14 deposition transcripts that were of USAA and Wells Fargo's
08:47:08 15 witnesses, the expert reports that were produced by
08:47:11 16 Mr. Calman and Mr. Weinstein, publicly available
08:47:15 17 information that I've obtained. I also relied upon my own
08:47:20 18 experience having worked on several patent matters
08:47:22 19 involving banks and payment-related processing,
08:47:26 20 intellectual property.

08:47:27 21 On the right side, I also interviewed several
08:47:30 22 people in forming my opinions, a number of folks from Wells
08:47:34 23 Fargo. For example, Ms. Lockwood-Stein, who you heard from
08:47:36 24 yesterday. And I also spent time with Dr. Villasenor
08:47:40 25 talking to him about the technical aspects of the case.

08:47:44 1 Q. Why did you talk with Ms. Lockwood-Stein and
08:47:46 2 Dr. Villasenor?

08:47:47 3 A. Part of my analysis is to really understand what the
08:47:51 4 intellectual property is at issue and how it relates and
08:47:55 5 how it's alleged to be used within Wells Fargo's systems.
08:47:58 6 And so I talked to Dr. Villasenor for that aspect of it
08:48:01 7 because he's -- he's the technical expert.

08:48:05 8 Another part of it is I needed to understand Wells
08:48:08 9 Fargo's business and the mobile remote deposit capture
08:48:11 10 system. And -- and that is Ms. Lockwood-Stein's area of
08:48:14 11 responsibility, so I talked to her about that and the
08:48:19 12 documents that were produced in this matter so I can put
08:48:21 13 them in proper context.

08:48:23 14 Q. Have you been with us during trial since the opening
08:48:27 15 statements?

08:48:27 16 A. Yes, I have.

08:48:28 17 Q. Before we go into the details of your opinions, would
08:48:31 18 you give us an overview of those?

08:48:33 19 A. Sure. I have three. So, again, my job is to evaluate
08:48:37 20 what is the incremental benefit provided by the
08:48:42 21 patents-in-suit. And so I know that Wells Fargo has a
08:48:48 22 manual capture remote deposit system that exists. That's
08:48:54 23 already there.

08:48:54 24 My job is to evaluate what's the additional
08:48:56 25 benefits that Wells Fargo would have achieved by adding

08:49:00 1 auto capture to -- to that system. And my analysis
08:49:02 2 indicates that that is no more than \$12.5 million.

08:49:06 3 Second, based upon my review of -- of
08:49:10 4 Mr. Weinstein's work and listening to his testimony, I
08:49:14 5 don't think he's actually providing a value of the
08:49:17 6 incremental benefits of those patents.

08:49:19 7 And, third, listening to the testimony, reading
08:49:24 8 Mr. Calman's work, that 40 percent apportionment factor
08:49:28 9 that Mr. Weinstein is relying upon in my opinion, it's
08:49:30 10 just -- it's just wrong.

08:49:32 11 Q. Now, Mr. Gerardi, while you were sitting in trial, did
08:49:37 12 you identify any agreements that you and Mr. Weinstein had?

08:49:42 13 A. Oh, yes, there were several. There were several.

08:49:46 14 Q. Would you please walk us through the agreements?

08:49:48 15 A. Sure. So -- and Mr. Weinstein laid out the construct
08:49:52 16 for this hypothetical negotiation.

08:49:55 17 We both agree that a reasonable royalty is an
08:49:58 18 appropriate measure of damage. We both agree that this
08:50:02 19 hypothetical -- hypothetical negotiation and assumptions
08:50:05 20 that go behind that hypothetical negotiation in terms of
08:50:09 21 the structure, what was known at the time, what was known
08:50:12 22 and what could be used in future events. The date of that
08:50:17 23 hypothetical negotiation is March 2015, we both agree on.

08:50:20 24 Mr. Weinstein and I both use and we both consider
08:50:22 25 those Georgia-Pacific factors that he identified and talked

08:50:25 1 to you about as helping to inform our analyses and helping
08:50:29 2 us conduct that hypothetical negotiation.

08:50:33 3 And we both agree that the damage period for this
08:50:36 4 case is going to run from December 2016 through trial. We
08:50:41 5 both, I believe, used November 4th as the date of our -- of
08:50:45 6 our analyses. So December 15th, 2006, through November 4th
08:50:50 7 of -- of today.

08:50:51 8 Q. Now, December '16 through November 4th, 2019, is just
08:51:01 9 under three years. Do you agree with that?

08:51:02 10 A. Yes, it's about 2.89 years.

08:51:05 11 Q. Are there other areas that you agreed with
08:51:08 12 Mr. Weinstein?

08:51:10 13 A. Yes, there are.

08:51:11 14 Q. Will you please describe those for the jury?

08:51:14 15 A. Sure. And, again, this is a very important piece.

08:51:17 16 This is something that both Mr. Weinstein and I both agree
08:51:20 17 on.

08:51:22 18 Again, we're measuring the benefits attributable
08:51:24 19 to the patents-in-suit, and -- and so the benefits
08:51:28 20 attributable to the patents-in-suit and - and the proper
08:51:31 21 quantification of those benefits puts a cap on -- on what
08:51:34 22 the damages would be as to how we're calculating our
08:51:38 23 royalty opinion.

08:51:39 24 Q. And does Mr. Weinstein -- is this the testimony from
08:51:43 25 Mr. Weinstein last week where he's indicating his agreement

08:51:46 1 with you on the cap?

08:51:47 2 A. Yes, it is. As you can see there, he's saying that the
08:51:51 3 switch to manual capture, it places a finite cap on what
08:51:56 4 the amount of the damages would be.

08:51:58 5 Q. Now, as far as non-infringing alternatives, what would
08:52:02 6 you do to analyze that?

08:52:04 7 A. So a couple of things, and if I could, maybe just to
08:52:08 8 reorient ourselves, the hypothetical negotiation that we
08:52:11 9 were looking at is going to occur here in the 2015 time
08:52:15 10 frame.

08:52:16 11 At that point in time, we knew that Wells Fargo
08:52:20 12 had over the course of three and a half years or so spent a
08:52:24 13 significant amount of time evaluating MRDC and that MRDC
08:52:30 14 was a manual capture MRDC because auto capture didn't exist
08:52:34 15 at that time. And so we know that -- that Wells Fargo had
08:52:37 16 evaluated that, and Ms. Lockwood-Stein testified to some of
08:52:42 17 that, as well.

08:52:43 18 We also know at the time of the hypothetical
08:52:46 19 negotiation that Wells Fargo was already in the market
08:52:50 20 for -- for two years -- a little over two years, with a
08:52:53 21 working viable manual capture MRDC system. And so that's
08:53:00 22 one -- or two pieces of evidence.

08:53:02 23 THE COURT: Counsel, approach the bench, please.

08:53:05 24 (Bench conference.)

08:53:09 25 THE COURT: I'm told by the courtroom deputy that

08:53:13 1 the monitors are not working at Plaintiff's counsel table;
08:53:17 2 is that correct?

08:53:17 3 MR. SHEASBY: That's correct. But we didn't want
08:53:19 4 to interrupt the examination, Your Honor.

08:53:20 5 THE COURT: Well, I don't -- I mean, I assume this
08:53:22 6 is going to be a lengthy examination. If we need to get
08:53:25 7 somebody in here and get them fixed, now is the time to do
08:53:27 8 it.

08:53:28 9 MR. SHEASBY: I think we probably should.

08:53:29 10 THE COURT: I mean, I would do the same thing if
08:53:31 11 they were not working at defense table.

08:53:33 12 MS. WILLIAMS: Oh, of course, Your Honor. Yes, of
08:53:35 13 course, by all means.

08:53:36 14 THE COURT: All right. I'll send the jury out for
08:53:40 15 just a few minutes. The Court has an IT person on staff
08:53:44 16 here, and I assume you have an IT person.

08:53:47 17 MR. SHEASBY: Yes, Your Honor.

08:53:48 18 THE COURT: We'll get them in here and see if we
08:53:51 19 can get it fixed.

08:53:52 20 MR. SHEASBY: Thank you.

08:53:52 21 MS. WILLIAMS: Yes, Your Honor. Thank you.

08:53:55 22 (Bench conference concluded.)

08:53:55 23 THE COURT: Ladies and gentlemen, there's a
08:53:56 24 technical issue that's arisen that we need to take care of
08:54:00 25 that shouldn't take more than a few minutes, but I'm not

08:54:02 1 going to keep you in the courtroom or in the jury box while
08:54:05 2 that's done.

08:54:06 3 I'm going to ask you to retire to the jury room
08:54:09 4 for just a few minutes. You can leave your notebooks in
08:54:11 5 your chairs, if you will. Just close them. Follow all my
08:54:14 6 instructions and don't discuss the case -- clearly not to
08:54:17 7 discuss the case among yourselves. And hopefully in just a
08:54:21 8 few minutes we'll have you back in here.

08:54:23 9 The jury is excused to the jury room.

08:54:25 10 COURT SECURITY OFFICER: All rise.

08:54:26 11 (Jury out.)

08:54:29 12 THE COURT: All right. I understand Plaintiff's
08:54:47 13 monitors are not working on their counsel table. Let's see
08:54:51 14 if we can get them fixed, whoever your IT person is. And
08:54:59 15 then the Court's IT person is on the way in.

08:55:01 16 We'll go off the record.

08:55:04 17 (Recess.)

08:55:53 18 THE COURT: All right. Let's go back on the
08:55:54 19 record.

08:55:55 20 Counsel, if you'll take your places.

08:55:57 21 Mr. Johnston, if you'll bring the jury back in.

08:56:01 22 It appears we now have the problem fixed.

08:56:21 23 COURT SECURITY OFFICER: All rise.

08:56:21 24 (Jury in.)

08:56:27 25 THE COURT: Thank you, ladies and gentlemen.

08:56:41 1 Please have a seat.

08:56:42 2 We'll continue with Defendant's direct examination
08:56:46 3 of Mr. Gerardi.

08:56:47 4 Ms. Williams, you may proceed.

08:56:50 5 MS. WILLIAMS: Thank you, Your Honor.

08:56:51 6 Q. (By Ms. Williams) Mr. Gerardi, we were -- before we
08:56:53 7 broke, we were talking about manual capture and what forms
08:56:58 8 the basis of your belief that it is a non-infringing
08:57:02 9 alternative.

08:57:02 10 Will you please -- so what is it -- why do you --
08:57:06 11 why is it your opinion that it's a non-infringing
08:57:08 12 alternative?

08:57:08 13 A. Sure. So, again, just to pick up where we left off, we
08:57:13 14 can see that USAA -- I'm sorry, Wells Fargo was in the
08:57:17 15 market for two years prior to that.

08:57:20 16 And if you look at their expectations, these are
08:57:24 17 data -- I think we've seen some examples of this
08:57:28 18 previously -- Wells Fargo had initially back in this time
08:57:31 19 frame, 2009, '10, and '11, projected what they thought the
08:57:36 20 market was going to look like.

08:57:37 21 And if you look at the actual Wells Fargo
08:57:40 22 volume -- MRDC volume, a manual capture-only system, you
08:57:44 23 can see by 2013, they were significantly well above their
08:57:48 24 expectations. And so they were putting through volume that
08:57:51 25 far exceeded what they thought was going to happen. So

08:57:53 1 another indication that it was a viable alternative for
08:57:56 2 them.

08:57:59 3 Q. Did you see anything else that -- that suggested to you
08:58:01 4 that manual capture was acceptable?

08:58:02 5 A. Yes, I did. We knew, again, at the time of the
08:58:09 6 hypothetical negotiation that Chase, second largest bank in
08:58:12 7 the country at the time, was in the market for five years
08:58:15 8 at that point in time performing manual capture MRDC.

08:58:18 9 Q. And what about USAA, is there any information about
08:58:23 10 their use of manual capture that you considered?

08:58:26 11 A. Sure. Again, we knew at the time of the hypothetical
08:58:30 12 negotiation that USAA was in the market for approximately
08:58:32 13 four years with a viable, working manual capture MRDC
08:58:37 14 system.

08:58:38 15 So all those things would have been known prior to
08:58:40 16 the hypothetical negotiation that we're looking at.

08:58:43 17 Q. So, at the time of the hypothetical negotiation, USAA
08:58:46 18 and Wells Fargo both would have known about Wells Fargo's
08:58:50 19 use of manual capture, Chase's use of manual capture, and
08:58:54 20 USAA's manual capture. Do I understand that correctly?

08:58:57 21 A. Yes, you do.

08:58:59 22 Q. You've heard testimony while you've been sitting in
08:59:03 23 trial about -- from USAA contesting whether manual capture
08:59:09 24 could be performed at scale. Do you -- do you have an
08:59:12 25 understanding of what "at scale" means?

08:59:13 1 A. So I think in this context, "at scale" means are the
08:59:18 2 systems at or can be expanded to accommodate the volumes
08:59:22 3 that we're talking about or that were expected by the banks
08:59:25 4 at that time.

08:59:25 5 And so by looking, again, at USAA's own
08:59:30 6 experience -- I'm sorry, Wells Fargo's own experience, they
08:59:32 7 were expecting this; they got that. You could see that
08:59:38 8 Chase was in the market, and as the second largest bank,
08:59:41 9 provides processing for a lot of checks. They were doing
08:59:45 10 that at scale, as well.

08:59:46 11 Q. Based on your review -- let me -- while you've been
08:59:51 12 here, you've also heard about the Futurion Report, correct?

08:59:54 13 A. I have.

08:59:56 14 Q. All right. And -- and the Futurion Report says that
09:00:01 15 auto capture must now be treated as a must have feature
09:00:05 16 across all strata of the financial services industry. Do
09:00:08 17 you remember that?

09:00:09 18 A. I do remember that.

09:00:11 19 Q. Okay. And you've seen that in PX-5, correct?

09:00:14 20 A. Yes, I have.

09:00:15 21 Q. Now, how does that impact your analysis of whether
09:00:20 22 manual capture was an acceptable alternative to auto
09:00:25 23 capture?

09:00:25 24 A. I've not seen any empirical data from the Futurion
09:00:33 25 Studies at all that would allow me, or I think anyone else,

09:00:37 1 to evaluate, to what extent a customer is going to come to
09:00:41 2 a bank or leave a bank, whether that bank has auto capture.

09:00:43 3 I haven't seen any of that empirical data in here at all.

09:00:47 4 I disagree with several of the points that are in
09:00:57 5 the Futurion Studies.

09:00:58 6 Q. Has Wells Fargo made any business decisions with regard
09:01:01 7 to its Mobile Deposit product that you considered as part
09:01:04 8 of your analysis around manual capture?

09:01:07 9 A. Yes, they have.

09:01:08 10 Q. And what is that?

09:01:09 11 A. Yesterday, you heard from Ms. Lockwood-Stein again that
09:01:13 12 after Wells Fargo introduced its auto capture in 2015 --
09:01:20 13 2000 -- yeah, that point in time, there were a number of
09:01:23 14 complaints. There were a number of issues that came up
09:01:27 15 that Ms. Lockwood-Stein and others were aware of. And they
09:01:29 16 made an informed business decision to reintroduce that
09:01:34 17 button that we see there back onto the screen to
09:01:38 18 accommodate or to address the concerns that were raised by
09:01:42 19 their customers that they wanted auto -- that they wanted
09:01:47 20 manual capture.

09:01:47 21 Q. While you've been in trial or sitting in trial, have
09:01:51 22 you heard any witness for either side disagree that manual
09:01:58 23 capture does not infringe USAA's patents?

09:02:00 24 A. No, I have not.

09:02:03 25 Q. If the jury agrees that mobile deposit with manual

09:02:12 1 capture is an acceptable alternative to auto capture, what
09:02:15 2 analysis did you do to calculate damages?

09:02:17 3 A. So, again, my role is to evaluate the -- the addition
09:02:24 4 of value provided by auto capture over the pre-existing
09:02:32 5 mobile remote deposit system that's using manual capture.

09:02:36 6 So my analysis is to say what's the incremental
09:02:39 7 difference there. And so I want to look at what's
09:02:41 8 happening up here at the MRDC level and evaluate what's
09:02:45 9 going on between auto capture and manual capture.

09:02:49 10 Q. And you have up here on -- on your slide ATM and
09:02:55 11 teller. Are -- are these other ways that checks get
09:02:58 12 deposited at Wells Fargo?

09:02:59 13 A. Sure. So, again, there's three primary ways an item or
09:03:03 14 a check gets into the bank.

09:03:04 15 One is through MRDC. Second is going to be
09:03:09 16 through the ATM channel. Third is going to be through the
09:03:13 17 teller channel.

09:03:14 18 And, again, I think it's important to recognize
09:03:16 19 that once those three items and those images are taken,
09:03:22 20 once they get sent into the system, everything that occurs
09:03:25 21 in that closet, everything that occurs in that back end,
09:03:29 22 it's all the same. All those items being processed the
09:03:32 23 same, once they're entered into the system.

09:03:35 24 Q. Is this information that the parties both would have
09:03:39 25 known at the time of the hypothetical negotiation?

09:03:41 1 A. Yes, absolutely.

09:03:42 2 Q. And why is it -- and to your knowledge, does USAA agree

09:03:48 3 with that?

09:03:48 4 A. Yes, I understand they do.

09:03:52 5 Q. And is this Mr. Bueche's testimony from earlier in the

09:04:00 6 trial?

09:04:00 7 A. Yes. So I was here, and Mr. Bueche did agree that

09:04:05 8 regardless of the capture method, whether it's MRDC, ATM,

09:04:11 9 or teller, once that item gets put to -- put into the

09:04:15 10 system, everything that goes on beyond in that door that I

09:04:19 11 had in the illustration is the same.

09:04:21 12 Q. Well, describe for us when you're evaluating damages,

09:04:24 13 what is it that you're trying to value?

09:04:26 14 A. So, again, you want to measure the incremental benefit.

09:04:31 15 What's the change between -- or what's the benefit that the

09:04:34 16 bank has received?

09:04:35 17 In this matter, I'm looking at the incremental

09:04:38 18 benefit or the additional benefit provided between the

09:04:42 19 manual capture process that the bank was already using and

09:04:46 20 not accused of infringing and the auto capture system that

09:04:48 21 is accused of infringement, and a specific method of auto

09:04:53 22 capture using USAA's patents.

09:04:54 23 Q. Did Mr. Weinstein do the same analysis?

09:04:58 24 A. No, he didn't.

09:04:59 25 Q. All right. We'll talk about that a little bit later.

09:05:02 1 Now, when you went to do your analysis of this
09:05:08 2 incremental benefit, where did you start?

09:05:10 3 A. So I started with trying to evaluate what were the
09:05:14 4 acceptance rates. And we've heard a lot of testimony the
09:05:17 5 last few days about manual capture and auto capture
09:05:20 6 acceptance rates or success rates.

09:05:23 7 And so I wanted to first evaluate and see what are
09:05:26 8 Wells Fargo's acceptance rates, both from a manual capture
09:05:29 9 standpoint and from an auto capture standpoint.

09:05:32 10 Q. Where did you find the manual success rate information?
09:05:38 11 A. So PX-31 was a document that Ms. Lockwood-Stein
09:05:43 12 presented to you yesterday -- yesterday is the starting
09:05:48 13 point from what I looked at and what I used.

09:05:52 14 Q. And looking at PX-31, what data points from this
09:05:58 15 information that Wells Fargo provided did you use?

09:05:59 16 A. So what you see on the screen primarily is a summation
09:06:03 17 of the information that I pulled out of PX-31. And you can
09:06:08 18 see that we look at the still rates for both iOS and
09:06:12 19 Android. We looked at the manual acceptance rates for iOS
09:06:16 20 and Android -- and I calculated that last column. It's
09:06:19 21 called still and manual weighted average acceptance
09:06:22 22 rates -- for the period January of '17 through May '19.
09:06:26 23 And I used the period -- the data from January of 2018
09:06:31 24 which demonstrated a manual weighted average acceptance
09:06:36 25 rate of 81.17 percent.

09:06:37 1 Q. Did you also find -- or look for success rates for auto
09:06:43 2 capture?

09:06:43 3 A. Yes, I did.

09:06:45 4 Q. Where did you -- where did you find that information?

09:06:49 5 A. So, again, using Lockwood-Stein -- I'm sorry, PX-31,
09:06:54 6 same source, same document -- I used that source, as well.

09:06:58 7 Q. And when you looked at PX-31, the information provided
09:07:02 8 by Wells Fargo, what did you determine?

09:07:04 9 A. So, again, this is what you see is a summation of the
09:07:08 10 information I pulled out of PX-31. I can see the auto
09:07:11 11 capture acceptance rates for both iOS, Apple, and the
09:07:16 12 Android systems. And, again, I calculated that weighted
09:07:20 13 average auto capture acceptance rate, and that ranged
09:07:24 14 anywhere from 77.86 percent to 90.79 percent.

09:07:29 15 Q. So for auto capture, you used a range?

09:07:31 16 A. For auto capture, I used the actual data that Wells
09:07:36 17 Fargo experienced over that time period, that's correct.

09:07:38 18 Q. And for manual capture, you picked 81.17 percent?

09:07:43 19 A. Correct.

09:07:44 20 Q. And if we look at the manual capture rates from -- from
09:07:48 21 PX-31 -- I mean, 81.17 percent looks like the highest
09:07:52 22 number you could have selected?

09:07:54 23 A. It's not the highest, but it is close to the highest.

09:07:57 24 Q. And why did you do that?

09:07:58 25 A. So, again, remember Ms. Lockwood-Stein testified that

09:08:05 1 PX-31 represents the data that Wells Fargo observed, and
09:08:11 2 particularly the manual capture data that Wells Fargo
09:08:14 3 observed, after the item has already failed auto capture.

09:08:18 4 So -- so it's an artificially low representation
09:08:22 5 of what Wells Fargo would have experienced or expected to
09:08:27 6 have experienced at the time of this hypothetical
09:08:29 7 negotiation for a true manual capture system.

09:08:32 8 I used other data to corroborate that, but I used
09:08:36 9 that data, given the limitations of what's in PX-31.

09:08:40 10 Q. Once you had the success rate for manual capture and
09:08:47 11 the success rate for auto capture from Wells Fargo's data,
09:08:51 12 what did you do next?

09:08:52 13 A. So, again, the second thing I did is just to put it
09:08:55 14 into text in evaluating that.

09:09:00 15 So -- so what we can see here -- so for the period
09:09:04 16 in question, December '16 through -- through November '19,
09:09:08 17 we have a number of MRDC deposits, and it's 231.3 million
09:09:14 18 units or so. That's in the second -- first column.

09:09:18 19 Mr. Weinstein and I agree on that number. That's
09:09:21 20 not -- not something we dispute.

09:09:23 21 I looked at the manual capture -- I'm sorry, the
09:09:25 22 but for capture rates. I'm going to use 81.17 percent
09:09:30 23 because I'm saying had Wells Fargo continued with its
09:09:34 24 manual capture MRDC system, that is the level of manual
09:09:40 25 capture acceptance rates they would have considered. I

09:09:43 1 looked at the auto capture acceptance rates over time, and
09:09:46 2 I calculated the difference between those two, and if the
09:09:50 3 calculation of those -- the difference between those two
09:09:56 4 leads me to the additional number of checks that would need
09:10:00 5 to be processed manually if they didn't use auto capture.
09:10:03 6 So that comes up to 16.4 million units approximately.

09:10:13 7 Q. Sorry. Did you consider any other data in this step of
09:10:17 8 your analysis?

09:10:18 9 A. Yes, I did.

09:10:19 10 Q. Will you please tell us what you considered?

09:10:21 11 A. So there were a number of pieces of information, and,
09:10:25 12 again, let's orient ourselves. I'm back at the time of
09:10:28 13 this hypothetical negotiation, and I'm Wells Fargo and I'm
09:10:32 14 USAA, and I'm trying to understand what is an expected
09:10:37 15 manual capture acceptance rate. And so we talked about
09:10:40 16 what I -- what I used from US -- Wells Fargo's perspective.

09:10:44 17 I know that in 2012, and the parties know that in
09:10:48 18 2012, USAA's manual capture success rate was 83.9 percent,
09:10:53 19 so approximately 84 percent. They would also know that in
09:10:57 20 the first full year after going to auto capture, the
09:11:00 21 success rate was 87.3 percent. So roughly a three and a
09:11:07 22 half, 4 point differential.

09:11:10 23 Q. Now, we've heard about Mitek. Did you consider any --
09:11:13 24 any information from Mitek during this part of your
09:11:16 25 analysis?

09:11:16 1 A. Yes, I did.

09:11:17 2 Q. What did you consider?

09:11:18 3 A. So, again, Mitek -- and they're the provider of
09:11:23 4 these -- of these front-end systems -- Mitek's expectation
09:11:28 5 that adding auto capture would improve a customer's manual
09:11:34 6 capture experience by approximately 5 to 7 percent.

09:11:37 7 Q. And you are -- you're referencing DTX-232?

09:11:41 8 A. Oh, yes, my apologies, DTX-232.

09:11:49 9 Q. During trial, have you heard any additional information
09:11:51 10 that you -- that supports your 81.17 percent?

09:11:55 11 A. Yes, I have.

09:11:55 12 Q. What is that?

09:11:56 13 A. So the first thing we had was -- was Mr. Calman's
09:12:03 14 demonstrative PDX-3.9. So he's looking at here -- at two
09:12:09 15 points in time from USAA's experience from April 2013. It
09:12:12 16 shows a 15.97 percent failure rate. What that -- what that
09:12:16 17 means is there's an 84 percent acceptance rate. And he's
09:12:21 18 showing a 9.31 percent failure rate when they went to auto
09:12:25 19 capture, which, again, translates to a 90, 91 percent
09:12:29 20 acceptance rate. So the difference between those two, as
09:12:32 21 he states here, is a 6.6 percent differential in the
09:12:36 22 acceptance rates on moving from manual to auto.

09:12:39 23 Q. Did Mr. Calman also talk about a DT -- DTX-160?

09:12:47 24 A. Yes, I believe he did.

09:12:48 25 Q. Let's look at that. And what does this tell us about

09:12:52 1 manual acceptance rates?

09:12:53 2 MR. SHEASBY: Your Honor, objection. Outside of
09:12:55 3 the scope of his report.

09:12:56 4 THE COURT: What's your response, Ms. Williams?

09:13:02 5 MS. WILLIAMS: Your Honor, Mr. Calman testified to
09:13:04 6 DTX-160, at trial. And so Mr. Gerardi is identifying that
09:13:09 7 to corroborate what he's already testified to. In
09:13:12 8 addition, it is one of the documents that he reviewed in
09:13:16 9 connection with his report.

09:13:20 10 THE COURT: The objection is overruled.

09:13:29 11 Q. (By Ms. Williams) Mr. Gerardi, Mr. Calman identified
09:13:32 12 DTX-160 during his testimony and talked about it. How did
09:13:35 13 you -- what does this tell us about the 81.17 percent
09:13:39 14 manual acceptance rate?

09:13:40 15 A. So what this document is, it's a document produced by
09:13:47 16 Wells Fargo at a point in time that shows that for the
09:13:50 17 period September 5th, they had a pre-MiSnap, so, again,
09:13:58 18 pre-auto capture acceptance rate of 20.48 percent -- I'm
09:14:04 19 sorry, failure rate. So the acceptance rate is the inverse
09:14:08 20 of that. So approximately 80 percent.

09:14:11 21 It shows that post-MiSnap, they had an 18.68
09:14:16 22 percent failure rate. And so, again, that shows in their
09:14:21 23 own words roughly 6 percent improvement. Limited data but
09:14:26 24 it shows that they were experiencing a 6 -- a 6 percent
09:14:31 25 improvement moving from manual capture to auto capture.

09:14:33 1 Q. And this was in 2014?

09:14:38 2 A. Yes, ma'am. So, again, it was prior to the
09:14:42 3 hypothetical negotiation.

09:14:42 4 Q. Did you hear any testimony from Mr. Bueche about
09:14:47 5 acceptance rates during trial?

09:14:49 6 A. Yes, I did.

09:14:50 7 Q. And what -- what did you hear about that?

09:14:52 8 A. So Mr. Bueche explained that -- that in 2014, after
09:14:59 9 they launched part of their auto capture, they had a
09:15:04 10 failure, whatever happened, that during that time period
09:15:08 11 when auto capture was down, USAA experienced a failure rate
09:15:13 12 of 19 percent on a manual capture basis, and, again, the
09:15:17 13 inverse of that means that they had a manual success rate
09:15:20 14 of 81 percent.

09:15:22 15 Q. All right. So let's go back to Step 1.

09:15:25 16 Once you had -- once you had the -- the success
09:15:31 17 rate for manual capture and the success rate for auto
09:15:33 18 capture, what did you do with those numbers?

09:15:36 19 A. Okay. So, again, to orient ourselves again. I have
09:15:41 20 16.4 million units that would have to be reintroduced into
09:15:45 21 Wells Fargo's system somehow. Some of those units, the
09:15:50 22 user may have tried to use the MRDC again, and maybe after
09:15:54 23 the second or third or fourth time it went in. I didn't
09:15:58 24 consider that.

09:15:58 25 I said, okay, those 16.4 million units are going

09:16:02 1 to come in either through the ATM channel or the teller
09:16:05 2 channel. Wells Fargo produced data. We could see that --
09:16:09 3 that approximately 46 percent of all those volumes came in
09:16:13 4 through the ATM channel -- it's like, 44 percent through
09:16:17 5 the ATM channel, 56 percent to the teller channel. So
09:16:20 6 basically, I took those 16.4 million units, and spread them
09:16:24 7 across the ATM teller channels based upon Wells Fargo's
09:16:30 8 actual experience on those channels.

09:16:31 9 Q. So what you're saying is 7.2 million checks that would
09:16:36 10 have been deposited by mobile deposit would be deposited by
09:16:43 11 ATM in the manual capture environment?

09:16:45 12 A. Correct.

09:16:45 13 Q. And 9.2 million checks would be deposited in -- by
09:16:50 14 teller if Wells Fargo were using manual capture over this
09:16:54 15 three-year time period that we're talking about?

09:16:57 16 A. That's correct.

09:16:58 17 Q. 16.4 million checks, is that a lot?

09:17:04 18 A. Relatively speaking, no, not at all.

09:17:08 19 Q. Why do you say that?

09:17:09 20 A. So, again, I think you have to put this into context.

09:17:12 21 For the period 2017 through the data I looked at,
09:17:16 22 beginning of 2019, Wells Fargo processed 273 million items
09:17:22 23 through their ATM channel, and they processed 344 million
09:17:27 24 items through their teller channel. So these other
09:17:30 25 volumes, the 7.2 million and the 9.2 million, you're adding

09:17:35 1 maybe 2 percent volume to that existing infrastructure.

09:17:39 2 And so from that context, no, it's not significant.

09:17:42 3 Q. Mr. Weinstein suggested that Wells Fargo was going to

09:17:45 4 have to build more branches to accommodate mobile deposit

09:17:52 5 volume. Do you agree or disagree with that?

09:17:54 6 A. Totally disagree with that.

09:17:55 7 Q. Well, why do you disagree?

09:17:58 8 A. So, again, I think you got to put this into context --

09:18:02 9 excuse me, I just moved that -- I think you've got to put

09:18:05 10 this into context.

09:18:06 11 Of the 16.4 million items we were just talking

09:18:10 12 about, I say 56 percent would have gone into the teller

09:18:13 13 channel. So, again, 9.2 million checks would have gone

09:18:21 14 into that teller channel. Over the roughly three years

09:18:26 15 we're talking about here for the damage period means that

09:18:26 16 3.1 million items would have gone to that check channel

09:18:29 17 per -- teller channel per year.

09:18:31 18 What does that mean? There's 251 banking working

09:18:36 19 days during the course of the year. That means you're

09:18:38 20 going to have 12,667 checks per day going into the

09:18:44 21 branches.

09:18:45 22 Wells Fargo has over 5,500 branches, and so

09:18:49 23 basically the math says you're going to put 2.3 checks per

09:18:53 24 day into a branch. And so I -- I find it hard to -- to

09:18:58 25 imagine that Wells Fargo is going to build a new branch to

09:19:01 1 accommodate 2.3 additional checks a day.

09:19:04 2 Q. Is it reasonable to think that Wells Fargo would pay

09:19:08 3 hundreds of millions of dollars to build new branches?

09:19:11 4 A. Absolutely not.

09:19:12 5 Q. All right. Now, you talked about the additional checks

09:19:14 6 that would need to be deposited by teller, but what about

09:19:18 7 the ATM?

09:19:19 8 A. So if we go through and perform the same analysis, the

09:19:22 9 same steps that I went through, the only difference here

09:19:24 10 being really the 44 percent that are coming in through ATM,

09:19:32 11 Wells Fargo has over 13,000 ATMs. And so if you look at

09:19:37 12 that additional volume, we're talking three quarters of a

09:19:40 13 check per day that may have to be deposited into an ATM.

09:19:44 14 Q. Now, we heard testimony that it is more expensive for

09:19:47 15 Wells Fargo to process checks through teller and ATM

09:19:54 16 instead of mobile deposit.

09:19:56 17 So when we talk about these 16.4 million checks

09:20:00 18 that need to go to another channel, what kind of cost is

09:20:03 19 Wells Fargo looking at incurring?

09:20:05 20 A. Sure. And I have a demonstrative to explain that.

09:20:06 21 So Wells Fargo, again, produced and we analyzed

09:20:11 22 the cost structures for ATM and teller processing.

09:20:19 23 Variable costs are costs that are going to change with

09:20:21 24 volume. Fixed costs are fixed costs. They're not going to

09:20:27 25 change with volume.

09:20:28 1 So think about it. If you have a bank and you pay
09:20:31 2 rent or a fixed cost for that branch, if you process two
09:20:34 3 more checks during that -- to that branch during that day
09:20:36 4 or during that year, you're not going to incur any more
09:20:41 5 fixed cost. You're not going to incur any more rate from
09:20:41 6 that.

09:20:41 7 There's variable costs that are generally
09:20:45 8 associated with processing these items. And the variable
09:20:46 9 costs for ATM transactions are listed here, and the
09:20:51 10 variable costs for teller tractions are listed here.

09:20:59 11 And so I applied those actual variable costs that
09:21:02 12 Wells Fargo incurred -- incurred in the ordinary course of
09:21:05 13 business, those incremental volumes.

09:21:07 14 Q. What did you do -- how did you apply these numbers in
09:21:11 15 your analysis?

09:21:12 16 A. So I think we have another demonstrative here.

09:21:14 17 So I looked at the total number of checks to be
09:21:18 18 added to the teller channel over the relative periods in
09:21:23 19 question. I applied the actual variable costs of
09:21:27 20 processing those teller-related items and did the math and
09:21:31 21 came up with the additional costs, at least for the teller
09:21:34 22 channel of a little over \$7 million.

09:21:37 23 Q. And did you do the same calculation for ATM?

09:21:39 24 A. I did. So I looked at the ATM volume -- or the volume
09:21:44 25 that would have gone through the ATM channel, applied the

09:21:48 1 actual variable costs for those items, I come up with \$4.7
09:21:52 2 million of additional expenses that the bank would have to
09:21:55 3 incur to process those items.

09:21:58 4 Q. Now, were you done with your calculation and your
09:22:03 5 analysis once you got to the 7 million figure and the 4.7
09:22:07 6 million figure?

09:22:08 7 A. No, I was not.

09:22:09 8 Q. What did you do next?

09:22:10 9 A. So the other thing I wanted to do is add something --
09:22:13 10 I'll call it customer experience. When Wells Fargo moved
09:22:20 11 from manual capture to auto capture, it spent time
09:22:25 12 educating the consumer and doing other things to make it a
09:22:29 13 more user friendly experience for the customer.

09:22:32 14 I added expenses here. Again, at the time of the
09:22:36 15 hypothetical negotiation, had Wells Fargo not moved from
09:22:39 16 its manual capture MRDC system, it potentially would have
09:22:45 17 incurred more expenses just to, again, improve the customer
09:22:49 18 experience over time. So they're contin -- continuously
09:22:51 19 trying to improve the customer experience.

09:22:53 20 Based upon my discussions with Ms. Lockwood-Stein
09:22:55 21 and Mr. Rosati, I put in an estimate based upon three to
09:23:01 22 five additional types of projects that may have been
09:23:03 23 incurred, again, just to improve that customer experience
09:23:08 24 over time. So I added that to the calculus.

09:23:10 25 Q. And what is your total -- what did you determine that

09:23:14 1 Wells Fargo would be willing to pay as a part of this
09:23:17 2 hypothetical negotiation?

09:23:18 3 A. So based upon the analysis that I've seen, Wells Fargo
09:23:23 4 was going to evaluate whether to stay with manual capture,
09:23:26 5 move to auto capture. The most incremental benefit that it
09:23:31 6 would receive is approximately \$12.5 million. So
09:23:37 7 \$12,496,736.00.

09:23:38 8 Q. And in your opinion, is this \$12.5 million the amount
09:23:47 9 Wells Fargo would pay for just -- for -- to USAA for
09:23:51 10 December 15th, 2016, through November 4th, 20 --

09:23:56 11 A. Yes, that's --

09:23:57 12 Q. -- 19?

09:24:00 13 A. -- yes, that's correct.

09:24:03 14 Q. So that's just for this roughly three-year period?

09:24:06 15 A. That's correct.

09:24:07 16 Q. And Mr. Weinstein is saying for that time period, that
09:24:13 17 Wells Fargo should pay \$300 million?

09:24:13 18 A. \$299 million, so, yes, that's correct.

09:24:14 19 Q. For that same three-year period?

09:24:15 20 A. For that same three-year period.

09:24:20 21 Q. Mr. Gerardi, I want to turn now to the -- the second
09:24:27 22 task that you were asked to -- to do in this case. You
09:24:29 23 mentioned that there are areas where you and Mr. Weinstein
09:24:33 24 disagree.

09:24:37 25 A. Correct.

09:24:37 1 Q. All right. So let's -- can you walk us through your
09:24:40 2 first area of disagreement with him?

09:24:41 3 A. Sure. And I think we have a demonstrative just to help
09:24:45 4 with that.

09:24:45 5 So, again, the -- the biggest area I have of
09:24:53 6 disagreement with Mr. Weinstein is -- is evidence relates
09:24:55 7 to a number of pieces of information that are coming from
09:25:00 8 2010, 2011, and Wells Fargo's evaluation of what they were
09:25:05 9 going to do to come into the MRDC market. All those
09:25:11 10 evaluations, whether it's cost savings, whether it's
09:25:15 11 projected increases in total deposits, whether it's other
09:25:20 12 ecosystem benefits, are all predicated upon a manual
09:25:23 13 capture system.

09:25:23 14 So -- so he's not evaluating the incremental
09:25:26 15 benefits of auto capture. He's looking at the benefits of
09:25:31 16 a -- of a manual deposit non-infringing system. He's not
09:25:34 17 evaluating, again, the incremental benefit that may come
09:25:38 18 from the use of auto capture based upon USAA's patents.

09:25:43 19 Q. But you did that analysis?

09:25:44 20 A. Yes, that's the analysis I just walked through.

09:25:48 21 Q. All right. And so up -- up here on the -- up here on
09:25:51 22 the monitor, we see some of the presentations that
09:25:55 23 Mr. Weinstein relied on. And is there anything in these
09:26:00 24 presentations that you saw that addressed auto capture?

09:26:02 25 A. Absolutely none.

09:26:03 1 Q. Is there anything in these presentations that
09:26:07 2 identifies the differences and the benefits from auto
09:26:11 3 capture?

09:26:11 4 A. Absolutely none.

09:26:12 5 Q. Were there other aspects of Mr. Weinstein's analysis
09:26:15 6 that you disagree with?

09:26:16 7 A. Yes.

09:26:18 8 Q. All right. What is the next one?

09:26:19 9 A. So, again, this goes to the -- to the issue of building
09:26:23 10 branches and -- and as they relate to mobile deposit.

09:26:29 11 Mr. Weinstein's analyses, as I understand it, is
09:26:33 12 saying that without MRDC, these items would have to go back
09:26:38 13 into the branch somehow. He's, again, ignoring the fact
09:26:41 14 that manual capture MRDC is there. And, again, he's
09:26:46 15 ignoring the capacity analyses that I just walked through
09:26:49 16 with you that a bank could still process these -- these
09:26:52 17 items through its existing channel. Again, 5,500 branches
09:26:57 18 and 13,000 ATMs have the capacity to handle these
09:27:03 19 additional items.

09:27:03 20 Q. But isn't Mr. Weinstein going a step further? He's
09:27:06 21 saying that Wells Fargo wouldn't even offer mobile deposit
09:27:09 22 if auto capture wasn't available?

09:27:10 23 A. Well, again, that goes back to what I said before.
09:27:14 24 He's ignoring the fact that MRDC is there. He's saying if
09:27:17 25 it wasn't there, everything would have to go back into

09:27:20 1 manual or teller, even though we know Wells Fargo had an
09:27:24 2 existing, working, viable, manual deposit -- I'm sorry,
09:27:29 3 manual capture mobile deposit system.

09:27:31 4 Q. Now, I -- I heard you say -- I just want to make sure
09:27:33 5 that I'm clear. He's saying that everything would have to
09:27:35 6 go back into ATM or teller, right?

09:27:37 7 A. Correct.

09:27:39 8 Q. And completely ignoring mobile deposit with manual
09:27:44 9 capture?

09:27:44 10 A. His analysis, as I understand it, assumes that that
09:27:48 11 channel just does not exist.

09:27:51 12 THE COURT: Counsel, approach the bench, please.
09:27:52 13 (Bench conference.)

09:27:59 14 THE COURT: Ms. Williams, if you're going to
09:28:02 15 testify, I'll put you on the witness stand.

09:28:05 16 MS. WILLIAMS: Yes, Your Honor.

09:28:05 17 THE COURT: You can't lead the witness like that.

09:28:07 18 MS. WILLIAMS: Yes, Your Honor.

09:28:07 19 THE COURT: Let's proceed.

09:28:08 20 (Bench conference concluded.)

09:28:15 21 THE COURT: Let's proceed.

09:28:16 22 MS. WILLIAMS: Yes, Your Honor.

09:28:17 23 Q. (By Ms. Williams) Mr. Gerardi, do you have other
09:28:22 24 disagreements with Mr. Weinstein's analysis?

09:28:24 25 A. Yes, I do.

09:28:25 1 Q. What is the next disagreement you have?

09:28:27 2 A. So I've summarized some of these here.

09:28:31 3 One of the biggest items of Mr. Weinstein's
09:28:36 4 analysis, part of that billion dollars he was coming up
09:28:41 5 with, is the cost savings that would have come from channel
09:28:44 6 optimization costs. And, again, he's saying that if Wells
09:28:48 7 Fargo did not have MRDC or auto capture MRDC, all those
09:28:54 8 items would have to go back into the channel, teller or
09:28:57 9 ATM, and be processed at a higher cost. Remember, we
09:29:02 10 walked through those ATM or teller costs?

09:29:05 11 A, he's saying all those items would have gone
09:29:08 12 back into the ATM or teller channel.

09:29:10 13 B, he's using the fixed costs. So he's not saying
09:29:15 14 that they're variable costs. He's saying that they're
09:29:17 15 fixed costs. So you would have to incur both fixed and
09:29:21 16 variable costs to process those. In my analogy, he would
09:29:25 17 shut down the entire mobile deposit platform that Wells
09:29:28 18 Fargo had existing already. So in his model, that doesn't
09:29:29 19 exist.

09:29:30 20 And the second point -- we talked about this
09:29:32 21 briefly -- is, again, he's ignoring that Wells Fargo had
09:29:36 22 5,500 branches and 13,000 ATMs and does not take into
09:29:43 23 consideration that those banks -- or those ATMs had the
09:29:46 24 capacity to process volume. He's saying that they -- they
09:29:51 25 would have had to use 184 additional branches. I don't see

09:29:54 1 that in the data.

09:29:55 2 Q. At the time of the hypothetical negotiation, would
09:29:59 3 Wells Fargo and USAA have that information?

09:30:02 4 A. Yes, they would.

09:30:03 5 Q. And is it reasonable to think that -- that Wells Fargo
09:30:08 6 would rethink using manual capture?

09:30:11 7 A. Well, of course. In the face of that situation, of
09:30:16 8 course they would.

09:30:16 9 Q. Now, you've mentioned the first two on -- on your
09:30:22 10 demonstrative here on Slide 32.

09:30:23 11 What are the other two disagreements that you have
09:30:26 12 with Mr. Weinstein?

09:30:27 13 A. So, again, one of the other elements Mr. Weinstein
09:30:30 14 presents is that he believes that mobile remote deposit
09:30:37 15 capture is going to -- is going to provide for a 20 percent
09:30:41 16 increase in new customers to the bank. So two things with
09:30:44 17 that. That was an aspiration that was identified in a
09:30:48 18 2009/2010 document.

09:30:50 19 A, he didn't do anything to evaluate whether, in
09:30:55 20 fact, MRDC -- manual or auto -- did, in fact, account for a
09:31:01 21 20 percent increase in new customers to the bank.

09:31:04 22 But even the bigger issue is that 20 percent
09:31:08 23 expectation of new customer growth is based upon a manual
09:31:12 24 capture system. And he didn't do anything to determine
09:31:14 25 whether it was an increase over that 20 percent to account

09:31:17 1 for the benefits of the patent-in-suit relative to what
09:31:21 2 Wells Fargo was expecting based upon a manual-only MRDC
09:31:25 3 system.

09:31:26 4 Q. Now, your last point on here, Mr. Gerardi, addresses
09:31:30 5 Zelle. What is your disagreement with Mr. Weinstein on his
09:31:34 6 use of Zelle?

09:31:36 7 A. I've seen nothing in the data produced by Wells Fargo
09:31:42 8 that would allow me to evaluate at all whether there was
09:31:48 9 any ecosystem benefit attributable to MRDC, manual or auto.

09:31:52 10 Q. And Mr. Weinstein acknowledged that he had difficulty
09:31:56 11 in evaluating that echo -- ecosystem benefit as well,
09:31:59 12 didn't he?

09:31:59 13 A. He did.

09:32:00 14 Q. And do you -- what is Zelle?

09:32:04 15 A. So Velle -- Zelle is -- is a peer-to-peer payment
09:32:09 16 system. I could go on my iPhone or device and send
09:32:14 17 somebody \$10.00 without having to do anything else. So
09:32:17 18 it's a method of -- of -- of moving money from one account
09:32:21 19 to another without having to go to a bank.

09:32:23 20 Q. And is -- in your opinion, is Zelle a proper proxy for
09:32:31 21 mobile deposit with auto capture in this case?

09:32:33 22 A. No, I don't think anything demonstrates that Zelle
09:32:37 23 has -- has comparability to the claims of the
09:32:40 24 patent-in-suit that we're talking about here.

09:32:44 25 Q. Now, let's go on to your third set of opinions in this

09:32:49 1 case.

09:32:50 2 Can you -- you mentioned that you had -- that you
09:32:55 3 believed -- or it is your opinion that Mr. Calman's 40
09:32:59 4 percent allocation to auto capture is wrong. Why is that
09:33:05 5 your opinion?

09:33:05 6 A. So there's a couple of examples here that come through.
09:33:09 7 Let's first talk about this error-free customer experience
09:33:12 8 model.

09:33:12 9 As I understand it Mr. Calman is trying to measure
09:33:20 10 something that occurs over a process. So there are steps
09:33:23 11 that occur. And what is the error-free or the errors that
09:33:27 12 occur in a step in a process. Here we're talking about a
09:33:30 13 one-step process, auto capture or manual capture.

09:33:32 14 And for that analysis, he's using the manual
09:33:37 15 capture success rates on PX-31 that represent only the
09:33:43 16 checks that already failed auto capture. So if you think
09:33:46 17 about it for a second, there's three primary ways an image
09:33:50 18 is not going to be accepted on your phone. It's either an
09:33:55 19 environmental error, the light is too light, too dark or
09:33:58 20 something. The second could be a user error. You're too
09:34:02 21 far away, too close, you're just not doing something from a
09:34:05 22 user perspective. Or a third is it could be a problem with
09:34:09 23 the item itself.

09:34:10 24 And so the auto capture rates that Mr. Calman is
09:34:12 25 using, they're reflecting those three experiences.

09:34:18 1 The manual capture rates that he's measuring are
09:34:23 2 what happens after auto capture has already failed. So if
09:34:25 3 auto capture has already failed for whatever those reasons,
09:34:29 4 he's measuring a manual capture rate that is already
09:34:34 5 defective because it's not -- it's already failing the auto
09:34:36 6 capture system. So if auto capture fails for some reason,
09:34:38 7 there's a pretty good likelihood manual capture is going to
09:34:42 8 fail as well.

09:34:42 9 So I don't think that's an appropriate test or
09:34:45 10 appropriate analysis.

09:34:46 11 The second part of that is, though, Mr. Calman's
09:34:50 12 analyses says that as a result of that test or that
09:34:53 13 analysis, 80 percent of the benefits of -- of -- of auto
09:34:58 14 capture are coming -- of MRDC are coming from auto capture.
09:35:03 15 But, you know, there's other things that are happening
09:35:05 16 there so I'm going to cut it down to 40 percent.

09:35:07 17 If the test comes up with the result but you have
09:35:10 18 to then cut it down because other things are happening,
09:35:14 19 maybe the test or maybe the analysis wasn't proper to begin
09:35:17 20 with.

09:35:22 21 Q. Was there another analysis that Mr. Calman used to
09:35:27 22 determine the 40 percent?

09:35:29 23 A. Sure. So, again, he's using this Net Promoter Score
09:35:35 24 model. And, again, nothing in that Net Promoter Score
09:35:38 25 model is tied to the specific facts and circumstances in

09:35:41 1 this case. It's more of an academic exercise. And he
09:35:45 2 incorrectly assumes that the success of Wells Fargo's
09:35:48 3 mobile banking is the result of auto capture.

09:35:50 4 But as we've seen in some of these other documents
09:35:55 5 and things that I've seen, there's a whole multitude of
09:35:58 6 other reasons why Wells Fargo's mobile banking platform was
09:36:02 7 successful, and he's not giving any attribution to those
09:36:06 8 either. He's not giving any attribution to any of those
09:36:09 9 other mobile banking attributes, other than auto capture.

09:36:13 10 Q. During -- during openings, you were here for opening?

09:36:24 11 A. Yes, I was.

09:36:25 12 Q. Did you hear Mr. Melsheimer's opening?

09:36:28 13 A. Yes, I did.

09:36:29 14 Q. And what did you hear him say about -- about checks?

09:36:36 15 A. Generally that checks over time are becoming less
09:36:39 16 important as a use of moving money -- of payments.

09:36:42 17 Q. Did you hear Mr. Melsheimer at any time say that checks
09:36:46 18 were irrelevant?

09:36:47 19 A. No, ma'am.

09:36:53 20 Q. What did Mr. Calman say about checks?

09:36:57 21 A. Well, I think there was some back and forth, and I
09:37:00 22 think ultimately, he admitted that in the prior testimony
09:37:05 23 back from 2007, and, again, I'm just stating, that checks
09:37:10 24 are declining. They're a dying product.

09:37:14 25 Q. And what does that tell us about what USAA and Wells

09:37:17 1 Fargo would have understood at the time of the hypothetical
09:37:21 2 negotiation?

09:37:21 3 A. So, again, let's position ourselves.

09:37:25 4 We're in 2015. We know -- we have data that
09:37:30 5 demonstrates that checks as -- as -- checks' use in the
09:37:34 6 economy have been declining precipitously. And so as part
09:37:39 7 of that negotiation, you have to take into consideration
09:37:44 8 where is the future of checks going to be, am I willing to
09:37:47 9 pay \$300 million for something that's becoming less and
09:37:51 10 less important in our economy.

09:37:52 11 Q. Mr. Gerardi, did you -- let me show you our next slide,
09:37:56 12 please.

09:37:57 13 So this is DTX-174. What is this?

09:38:00 14 A. This is a study that's prepared by the Federal Reserve
09:38:06 15 Bank. And, again, it shows non-cash payments over time.
09:38:10 16 And so for -- for this period we're looking at 2000 through
09:38:14 17 2017. And as you can see over time, checks are really just
09:38:19 18 going down, and by 20 -- 2007, give or take, you know,
09:38:25 19 checks were overtaken by debit cards. We've all seen --
09:38:32 20 use debit cards more and more, credit cards more and more,
09:38:39 21 ACH and -- Automated Clearing House transactions,
09:38:40 22 businesses and other -- and other more enterprises are
09:38:41 23 getting rid of checks early in the process, and you have a
09:38:44 24 rise of prepaid debit cards. Gift cards are one of the
09:38:49 25 things that have a set amount of money on them that you can

09:38:51 1 just go to the store and use.

09:38:52 2 So you can see over time, checks really are
09:38:54 3 declining as a medium but -- for payments in the economy.
09:38:58 4 And, again, that check has gone down since -- throughout
09:39:01 5 the entire period here. So at the time of the
09:39:03 6 hypothetical, you're going to know that that's happened.

09:39:05 7 Q. So DTX-174, what is that?

09:39:10 8 A. DTX-174, again, it was a report produced by the Federal
09:39:18 9 Reserve Bank that demonstrates that the checks in our
09:39:19 10 economy are declining significantly over time. And would
09:39:23 11 help inform, you know, the negotiators as to where checks
09:39:27 12 are going to be over time.

09:39:28 13 Q. And is this something that both USAA and Wells Fargo
09:39:31 14 would have known at the time of the hypothetical
09:39:32 15 negotiation?

09:39:32 16 A. Oh, sure. This is a public document. It's produced by
09:39:36 17 the Federal Reserve on a regular basis.

09:39:39 18 Q. All right. So -- so let's go back to the hypothetical
09:39:43 19 negotiation between the parties.

09:39:44 20 And you've talked about the Federal Reserve
09:39:49 21 information. You've talked about the decline of checks.
09:39:51 22 You've talked about the information. But over -- overall,
09:39:55 23 what does this information have -- what is its impact on
09:40:00 24 the hypothetical negotiation for USAA and Wells Fargo?
09:40:01 25 A. It's going to put it into perspective, and it's going

09:40:06 1 to limit the amount that the banks -- that Wells Fargo is
09:40:08 2 going to consider to pay because of where this market is
09:40:10 3 and where it's going.

09:40:12 4 Q. And so when you heard Mr. Weinstein testify earlier
09:40:15 5 that it was going to put a finite cap, do you agree or
09:40:19 6 disagree with that?

09:40:19 7 A. Yes. Again, I agree that the benefits attributable to
09:40:24 8 adding auto capture or the cost of staying with manual
09:40:28 9 capture, that's the analysis that I performed and walked
09:40:30 10 you through, again, it puts a cap on the damages. And,
09:40:35 11 again, Mr. Weinstein and I agree that if manual capture is
09:40:37 12 a viable non-infringing alternative, that's the cap that's
09:40:40 13 going to be -- that's going to form the basis of that
09:40:44 14 royalty for that period of time that we're talking about.

09:40:46 15 Q. And if Wells Fargo and USAA perform the hypothetical
09:40:50 16 negotiation, what is the -- what would Wells Fargo have
09:40:55 17 agreed to pay in your opinion?

09:40:57 18 A. For the period in time that I've talked about, December
09:40:59 19 15th, 2016 through November 4th, 2019, \$12.5 million.

09:41:05 20 Q. Have you also calculated damages for the period
09:41:10 21 February 3rd, 2018 through trial?

09:41:12 22 A. Yes, I have.

09:41:12 23 Q. And what is that number?

09:41:13 24 A. Approximately \$10.5 million.

09:41:15 25 Q. And have you calculated damages for the period June

09:41:19 1 7th, 2018 through trial?

09:41:21 2 A. Yes, I have.

09:41:22 3 Q. And what is that number?

09:41:23 4 A. \$9 million.

09:41:25 5 Q. If the jury finds that Wells Fargo does not infringe

09:41:28 6 USAA's patent, what are the damages?

09:41:33 7 A. Zero.

09:41:36 8 MS. WILLIAMS: Your Honor, may I have a moment?

09:41:38 9 THE COURT: You may.

09:41:49 10 MS. WILLIAMS: Your Honor, may I approach, please?

09:41:52 11 THE COURT: You may approach the bench, counsel.

09:41:58 12 (Bench conference.)

09:41:59 13 MS. WILLIAMS: Your Honor, I would like to ask

09:42:01 14 Mr. Gerardi if -- if USAA has licensed its patents to

09:42:05 15 anyone else. He'll say no. And I just want to ask that

09:42:09 16 one question.

09:42:10 17 MR. SHEASBY: Your Honor, you've already excluded

09:42:12 18 that question. They were attempting to ask Mr. Weinstein

09:42:15 19 that, and you said that was improper because there were no

09:42:18 20 comparable license agreements in the case.

09:42:20 21 MS. WILLIAMS: But the fact of whether USAA has a

09:42:22 22 licensing -- has been able to license these patents is a

09:42:26 23 factor that would have gone into that negotiation at the

09:42:29 24 hypothetical -- as part of the hypothetical negotiation,

09:42:32 25 Your Honor, under the Georgia-Pacific factors.

09:42:33 1 MR. SHEASBY: That's section of Mr. Gerardi's
09:42:35 2 report has been fully excluded by the Court -- during the
09:42:42 3 motion process.

09:42:43 4 MS. WILLIAMS: So we're not going to go into
09:42:45 5 the -- go into the licensing efforts in toto. I'm just
09:42:50 6 going to ask him one question, has USAA licensed these
09:42:53 7 patents.

09:42:53 8 MR. SHEASBY: And that's no longer in his report,
09:42:56 9 Your Honor. That's been fully stricken.

09:42:57 10 THE COURT: Well, we can't ask that one question
09:43:00 11 and walk away without developing the full context, and I
09:43:03 12 believe that would be improper in light of the striking
09:43:08 13 orders that the Court's done in pre-trial with regard to
09:43:11 14 his report. So that request is overruled.

09:43:14 15 MR. SHEASBY: Thank you, Your Honor.

09:43:15 16 MS. WILLIAMS: Thank you, Your Honor.

09:43:16 17 (Bench conference concluded.)

09:43:25 18 MS. WILLIAMS: Your Honor, I pass the witness.

09:43:27 19 THE COURT: All right. Cross-examination.

09:43:28 20 MR. SHEASBY: Yes, Your Honor. May I approach
09:43:29 21 with binders?

09:43:30 22 THE COURT: You may.

09:43:31 23 MR. SHEASBY: Thank you.

09:43:31 24 CROSS-EXAMINATION

09:43:56 25 BY MR. SHEASBY:

09:43:56 1 Q. Good morning, Mr. Gerardi.

09:43:57 2 A. Good morning.

09:43:58 3 Q. I -- I've laid a binder next to your desk. I may ask

09:44:07 4 you about that.

09:44:07 5 We've met before?

09:44:09 6 A. Yes, we have.

09:44:10 7 Q. We met at your deposition?

09:44:12 8 A. Yes.

09:44:13 9 Q. Now, you agree that for the damages period at issue in

09:44:20 10 this case, there were approximately 231 million checks that

09:44:33 11 were successfully deposited using the auto capture system

09:44:35 12 that's accused of infringement in this case?

09:44:36 13 A. That were deposited through the MRDC system, yes,

09:44:40 14 that's correct.

09:44:40 15 Q. No, sir, they were deposited using -- actually using

09:44:44 16 auto capture, correct?

09:44:45 17 A. That's correct.

09:44:45 18 Q. So for the ladies and gentlemen of the jury, 231

09:44:50 19 million checks successfully deposited using auto capture

09:44:54 20 MRDC, fair?

09:44:56 21 A. I would agree with that.

09:44:57 22 Q. Now, sir, you're not a software engineer, fair?

09:45:05 23 A. That's correct.

09:45:07 24 Q. You don't build or evaluate mobile check applications,

09:45:11 25 correct?

09:45:11 1 A. That's correct.

09:45:12 2 Q. You're not an expert in check imaging or even document

09:45:16 3 imaging, correct?

09:45:17 4 A. That's fair.

09:45:18 5 Q. And though you've referenced previous bank experience,

09:45:21 6 you have no experience whatsoever in commercial mobile

09:45:25 7 remote deposit capture industry before you were paid to be

09:45:29 8 an expert by Wells Fargo, correct?

09:45:31 9 A. That's fair.

09:45:34 10 Q. No experience in the subject matter of this case,

09:45:41 11 commercial MRDC industry, before being hired by Wells

09:45:45 12 Fargo, fair?

09:45:46 13 A. Commercial MRDC, that's fair.

09:45:51 14 Q. Now, because you don't have a technical background, you

09:46:01 15 actually spoke to a technologist in this case, correct?

09:46:04 16 A. If you're referring to Dr. Villasenor, yes.

09:46:08 17 Q. I am. Dr. Villasenor, the technical individual,

09:46:12 18 correct?

09:46:12 19 A. Yes.

09:46:12 20 Q. You relied on him for technical opinions, correct?

09:46:15 21 A. Yes.

09:46:16 22 Q. One of the predicates that you asked the ladies and

09:46:21 23 gentlemen of the jury to rely on is that manual capture

09:46:25 24 would be a commercially viable non-infringing alternative,

09:46:29 25 fair?

09:46:29 1 A. That is one of the predicates that I cited, yes.

09:46:33 2 Q. In fact, you mentioned it many times in your direct

09:46:36 3 examination, fair?

09:46:38 4 A. I did.

09:46:38 5 Q. And it was Mr. -- Dr. Villasenor who told you that

09:46:44 6 manual capture is a commercially viable non-infringing

09:46:46 7 alternative, fair? He told you that?

09:46:48 8 A. He was one of the people that told me that, yes.

09:46:51 9 Q. If I could get -- Dr. Villasenor told you that manual

09:46:58 10 capture is a commercially viable non-infringing

09:47:01 11 alternative, correct?

09:47:02 12 A. I believe he told me it was a technically

09:47:06 13 non-infringing alternative. I don't know if I said he

09:47:08 14 gave -- he said it was commercially viable.

09:47:10 15 Q. So why don't we turn to your deposition, Page 16, Lines

09:47:15 16 8 through 12?

09:47:21 17 Question: So I -- so I actually just --

09:47:25 18 MS. WILLIAMS: Objection, Your Honor.

09:47:27 19 Q. (By Mr. Sheasby) So --

09:47:28 20 THE COURT: What's your objection, counsel?

09:47:29 21 MS. WILLIAMS: If he -- he should not be

09:47:31 22 displaying this to the jury, Your Honor.

09:47:33 23 MR. SHEASBY: Your Honor, I'm impeaching him right

09:47:35 24 now.

09:47:35 25 MS. WILLIAMS: It's improper impeachment, Your

09:47:40 1 Honor.

09:47:40 2 MR. SHEASBY: I'm going to show a contradictory
09:47:44 3 statement from his deposition.

09:47:44 4 THE COURT: I -- I understand. You need to -- you
09:47:46 5 need to give the witness an opportunity to refresh his
09:47:48 6 recollection and confirm that was his testimony, and then
09:47:50 7 if he -- if he confirms that's his testimony after it being
09:47:55 8 refreshed, then you're entitled to show the prior
09:47:58 9 inconsistent statement.

09:47:59 10 MR. SHEASBY: So we'll go to Column 6 -- Page 16,
09:48:03 11 Lines 8 through 12.

09:48:03 12 A. I'm sorry, where in my binder am I referring to?

09:48:08 13 Q. (By Mr. Sheasby) That's your deposition, sir. It's
09:48:09 14 your first tab, I believe.

09:48:12 15 A. I'm sorry, which page, please?

09:48:14 16 Q. Page 16, Lines 8 through 12.

09:48:30 17 A. Yes, that's what I stated.

09:48:32 18 MR. SHEASBY: So why don't we publish that now.

09:48:34 19 MS. WILLIAMS: Objection, Your Honor. He just --
09:48:36 20 he just agreed to it.

09:48:41 21 MR. SHEASBY: Your Honor, he just agreed to
09:48:42 22 something that was different from what he had previously --

09:48:45 23 THE COURT: I'll allow -- I'll allow counsel to
09:48:47 24 publish the deposition testimony.

09:48:50 25 Q. (By Mr. Sheasby) Question: So I actually just need

09:48:53 1 precision. So, one, Dr. Villasenor told you that it's his
09:48:58 2 opinion that manual capture is a commercially acceptable
09:49:04 3 non-infringing alternative, fair?

09:49:06 4 Answer: Yes.

09:49:08 5 Did you give that testimony under oath,
09:49:09 6 Mr. Gerardi?

09:49:10 7 A. Oh, yes, I did.

09:49:12 8 Q. And you told the ladies and gentlemen of the jury, even
09:49:16 9 though you're not a technologist, that manual capture is a
09:49:19 10 commercially viable non-infringing alternative, fair?

09:49:22 11 A. I did.

09:49:24 12 Q. Now, in reality, Dr. Villasenor was not asked to
09:49:29 13 investigate whether it would be commercially acceptable for
09:49:35 14 consumers not to have auto capture, correct?

09:49:37 15 A. I don't know the extent of his opinion on that.

09:49:41 16 Q. Well, why don't I refresh your recollection. If you
09:49:44 17 turn to --

09:49:46 18 MR. SHEASBY: Why don't we put up the Villasenor
09:49:50 19 deposition at 101, 8 through 14?

09:49:50 20 MS. WILLIAMS: Objection, Your Honor, improper
09:49:52 21 impeachment.

09:49:52 22 THE COURT: We're going to follow the same
09:49:54 23 protocol that I've outlined.

09:49:57 24 MS. WILLIAMS: Your Honor, this isn't the
09:49:59 25 witness's own statement.

09:50:00 1 MR. SHEASBY: It's not impeachment, Your Honor.

09:50:01 2 It's refreshing a recollection.

09:50:02 3 THE COURT: Then what's your objection,

09:50:06 4 Ms. Williams?

09:50:07 5 MS. WILLIAMS: Your Honor, you do not show

09:50:09 6 information that is used to refresh the witness's

09:50:12 7 recollection to the jury.

09:50:14 8 THE COURT: Counsel, approach the bench.

09:50:26 9 (Bench conference.)

09:50:27 10 THE COURT: First of all, tell me what you're

09:50:28 11 trying to do.

09:50:29 12 MR. SHEASBY: Dr. Villasenor admitted that he gave

09:50:32 13 no opinion whatsoever on whether there's a commercially

09:50:34 14 viable non-infringing alternative.

09:50:36 15 THE COURT: And how are you attempting to

09:50:39 16 establish that information?

09:50:40 17 MR. SHEASBY: I'm going to show it from his sworn

09:50:43 18 deposition testimony.

09:50:46 19 THE COURT: And you're asking this witness to

09:50:48 20 either agree or disagree as to what Dr. Villasenor did or

09:50:51 21 didn't admit to?

09:50:52 22 MR. SHEASBY: No, I'm just asking -- I'm

09:50:55 23 refreshing his recollection that Dr. Villasenor testified

09:50:57 24 that he hadn't done this analysis, which is inconsistent

09:51:00 25 with his representation that Dr. Villasenor told him he had

09:51:03 1 done this analysis.

09:51:04 2 I can do it through a trial transcript, but it
09:51:08 3 seems to me we can -- I mean, this is the exact same
09:51:10 4 testimony I elicited at trial.

09:51:14 5 THE COURT: Well, if you're going to ask this
09:51:16 6 witness if he heard Dr. Villasenor testify and then you're
09:51:19 7 going to show him Dr. Villasenor's prior testimony, that's
09:51:23 8 fine. But showing him an affidavit or some prior
09:51:28 9 declaration, I have a problem with that.

09:51:29 10 MR. SHEASBY: It's just deposition testimony, Your
09:51:31 11 Honor.

09:51:31 12 THE COURT: Well, deposition testimony is an
09:51:35 13 out-of-court statement.

09:51:37 14 Ms. Williams, what's your position on all this?

09:51:39 15 MS. WILLIAMS: Our position is that it's improper
09:51:42 16 for him to use the deposition to impeach this witness. If
09:51:46 17 he wants to refer to the --

09:51:49 18 THE COURT: Yeah, he can't impeach this witness
09:51:51 19 with a statement that's not attributable to him.

09:51:55 20 MS. WILLIAMS: Yes.

09:51:55 21 THE COURT: It's not impeachment. You're just
09:51:57 22 trying to establish that apparently he's wrong in your
09:52:02 23 opinion, Mr. Sheasby, about what Dr. Villasenor did or
09:52:05 24 didn't tell him.

09:52:06 25 MR. SHEASBY: That's correct, Your Honor.

09:52:07 1 MS. WILLIAMS: But if there's -- excuse me.

09:52:09 2 THE COURT: Go ahead.

09:52:13 3 MS. WILLIAMS: I'm sorry. But if there's trial

09:52:14 4 testimony from Dr. Villasenor, then he can reference that

09:52:17 5 here. But going into the deposition of Dr. Villasenor is

09:52:20 6 not the proper way to establish that --

09:52:22 7 THE COURT: And -- and I agree with that, Mr.

09:52:23 8 Sheasby.

09:52:23 9 MR. SHEASBY: Your Honor, it's the exact same

09:52:25 10 testimony.

09:52:25 11 THE COURT: I don't care.

09:52:25 12 MR. SHEASBY: So may I have a moment to --

09:52:27 13 THE COURT: There's a difference between

09:52:27 14 deposition testimony and live trial testimony.

09:52:29 15 MR. SHEASBY: May I have a moment to get the trial

09:52:31 16 testimony?

09:52:31 17 THE COURT: Yes, sir, you may have a moment.

09:52:36 18 MS. WILLIAMS: Thank you, Your Honor.

09:52:36 19 (Bench conference concluded.)

09:53:01 20 THE COURT: Let me know when you've found what

09:53:03 21 you're looking for, Mr. Sheasby.

09:53:04 22 MR. SHEASBY: Thank you, Your Honor.

09:53:42 23 Mr. Huynh, can we have yesterday's PM transcript

09:53:47 24 at Page 108?

09:54:02 25 Q. (By Mr. Sheasby) Now, Mr. Gerardi, you have previously

09:54:05 1 testified under oath that Dr. Villasenor had told you that
09:54:12 2 manual capture was a commercially viable non-infringing
09:54:15 3 alternative, correct?
09:54:15 4 A. Yes.
09:54:16 5 Q. At trial, Dr. Villasenor was asked the question,
09:54:24 6 question: Now, you're not asked to investigate whether it
09:54:27 7 would be commercially acceptable for consumers not to have
09:54:31 8 auto capture, correct?
09:54:34 9 A. I'm sorry, which line are you on?
09:54:36 10 Q. I'm on Line 23.
09:54:37 11 A. Got you. That's what he stated.
09:54:44 12 Q. And his answer was: That's correct.
09:54:45 13 A. Yes.
09:54:46 14 Q. And then he was asked: You have no opinion as to
09:54:49 15 whether it would be commercially viable for Wells Fargo not
09:54:53 16 to offer auto capture, correct?
09:54:58 17 A. That's what he's testified to, yes.
09:55:01 18 Q. And his answer is: That's correct?
09:55:06 19 A. As I stated, yes, that's what he stated.
09:55:09 20 Q. So -- so you told the ladies and gentlemen of the jury
09:55:12 21 that manual capture was a commercially viable
09:55:16 22 non-infringing alternative, correct?
09:55:17 23 A. I did.
09:55:18 24 Q. You're not a technologist, correct?
09:55:19 25 A. I'm not a technologist.

09:55:20 1 Q. You told the ladies and gentlemen of the jury that you
09:55:21 2 relied on a technologist whose name was Dr. Villasenor to
09:55:25 3 help you, correct?

09:55:26 4 A. To help me, yes.

09:55:27 5 Q. You told under oath in your deposition that
09:55:32 6 Dr. Villasenor told that you manual capture was a
09:55:34 7 commercially viable non-infringing alternative, correct?

09:55:37 8 A. I did.

09:55:38 9 Q. Dr. Villasenor said the exact opposite at his -- at his
09:55:44 10 trial -- his trial testimony. He has no opinion whatsoever
09:55:47 11 on whether it would be commercially viable, correct?

09:55:50 12 A. On the commercially viable aspect, that's correct.

09:55:54 13 Q. And, Mr. Gerardi, you're an experienced expert,
09:56:00 14 correct?

09:56:00 15 A. I've testified in court.

09:56:01 16 Q. It's fair for the ladies and gentlemen of the jury to
09:56:04 17 compare the statements and representations you made to me
09:56:08 18 under oath in your deposition with Dr. Villasenor's
09:56:13 19 testimony under oath at trial, correct? It's fair for them
09:56:16 20 to balance those two?

09:56:17 21 A. Oh, absolutely. Absolutely.

09:56:18 22 Q. Now, sir, you gave some opinions about the importance
09:56:43 23 of auto capture in this case, correct?

09:56:49 24 A. In part, yes.

09:57:06 25 Q. And you heard testimony from Mr. Saffici earlier in

09:57:32 1 this case that the patents are what is referred to in the
09:57:36 2 industry as auto capture, correct?

09:57:38 3 A. Are you referring to his video deposition?

09:57:41 4 Q. Yes, sir.

09:57:43 5 A. Yes, I heard that.

09:57:44 6 Q. He said that the patents-in-suit introduce autonomous
09:57:48 7 monitoring and corrective feedback, correct?

09:57:51 8 A. I don't remember the specific words that he stated.

09:57:54 9 Q. But he did say that they claim what's referred to in
09:57:58 10 the industry as auto capture, correct?

09:57:59 11 A. I believe that's what he stated.

09:58:02 12 Q. Now, you also heard testimony from Mr. Rosati, correct?

09:58:05 13 A. Yes.

09:58:06 14 Q. And Mr. Rosati testified that Wells Fargo implemented
09:58:10 15 what is known in the industry as auto capture, correct?

09:58:13 16 A. Correct.

09:58:14 17 Q. And Wells Fargo's corporate representative, Mr. Ajami,
09:58:27 18 you've read his deposition testimony, correct?

09:58:29 19 A. A while ago, yes.

09:58:31 20 Q. And Mr. Ajami, who was the executive responsible for
09:58:36 21 the implementation of auto capture, he testified that he
09:58:40 22 had no factual basis to disagree that auto capture must now
09:58:44 23 be treated as a must-have feature across all strata of the
09:58:50 24 financial services industry, correct?

09:58:53 25 A. I don't remember the specific words, but I believe

09:58:58 1 something akin to that is correct.

09:58:59 2 Q. He was shown the same Futurion Report that you showed

09:59:03 3 to the ladies and gentlemen of the jury, correct?

09:59:06 4 A. Again, I don't recall what was shown to him at his

09:59:09 5 deposition, sir.

09:59:10 6 Q. You recollect that he testified that auto capture must

09:59:14 7 now be treated as a must-have feature across all strata of

09:59:19 8 the financial services industry, correct?

09:59:22 9 A. Again, I read his deposition, sir, a long time ago. I

09:59:25 10 don't recall the specific words that he used.

09:59:27 11 Q. Would it be fair to say that in your testimony to the

09:59:31 12 ladies and gentlemen of the jury, you did not discuss with

09:59:32 13 them any of Mr. Ajami's testimony?

09:59:35 14 A. No, I didn't mention Mr. Ajami in the context of any of

09:59:44 15 the things that I mentioned to the jury.

09:59:45 16 Q. Now, you stated that for the Futurion 2017 Mobile

10:00:06 17 Deposit Benchmark Report, you showed a slide on that to the

10:00:09 18 ladies and gentlemen of the jury, correct?

10:00:09 19 A. Yes, I did.

10:00:10 20 Q. And you said that there was no empirical data

10:00:15 21 supporting the conclusions in that report, fair?

10:00:18 22 A. Yes.

10:00:19 23 Q. But the report was based on consumer attitudinal and

10:00:28 24 behavioral data from surveying 1,044 consumers in July of

10:00:37 25 2017, correct?

10:00:38 1 A. I believe that's what it states but that data was not
10:00:42 2 part of the study itself.

10:00:44 3 Q. Sir, the report said that it was based on consumer
10:00:47 4 attitudinal and behavioral data as the result of surveying
10:00:52 5 1,044 consumers in July 2017, correct?

10:00:55 6 A. That's what is stated in the report.

10:00:57 7 Q. And it also states that working with digital strategy
10:01:00 8 and design agency Comrade, live deposit accounts were
10:01:00 9 accessed for each of the 15 financial institutions during
10:01:03 10 July and August of 2017, with all such ratings provided by
10:01:10 11 Comrade's user experience designers, correct?

10:01:13 12 A. You're providing a specific quote, so I need to see the
10:01:16 13 document just to confirm that quote, please?

10:01:18 14 Q. Sure. Why don't you turn to Tab 4 in your binder, this
10:01:23 15 is PX-005, Page 6 and 7.

10:01:38 16 MR. SHEASBY: And why don't we go ahead and
10:01:39 17 publish those since it's pre-admitted?

10:01:47 18 Q. (By Mr. Sheasby) So -- just so the record is clear,
10:01:50 19 this is the Futurion 2017 Report, correct?

10:01:53 20 A. Yes, it is.

10:01:53 21 Q. You told the ladies and gentlemen of the jury that
10:01:55 22 you -- there was no empirical data supporting its
10:01:58 23 conclusions, correct?

10:01:59 24 A. Correct.

10:01:59 25 Q. And there's a two-page discussion of its methodology,

10:02:03 1 correct?

10:02:03 2 A. There's a discussion of the methodology, that's

10:02:05 3 correct.

10:02:05 4 Q. Yeah. And you didn't address that issue with the jury,

10:02:08 5 correct?

10:02:08 6 A. I'm sorry, which issue, sir?

10:02:12 7 Q. The methodology that's described in the Futurion

10:02:17 8 Report, fair?

10:02:18 9 A. Yeah, I didn't discuss the methodology with the jurors,

10:02:23 10 that's correct.

10:02:23 11 Q. Now, you also talked about some calculations that you

10:02:33 12 did using data provided by Ms. Lockwood-Stein, correct?

10:02:38 13 A. Yes.

10:02:39 14 MR. SHEASBY: And why don't we pull up your

10:02:42 15 Demonstrative Slide 14? Go one more, I think, Mr. Huynh.

10:02:54 16 Perfect.

10:02:55 17 Q. (By Mr. Sheasby) So for the ladies and gentlemen of

10:02:59 18 the jury, for your hypothetical negotiation, you took the

10:03:06 19 manual capture rate of 81.7 [sic] percent, correct, that's

10:03:12 20 what you used as the manual capture rate in your

10:03:14 21 calculations, fair?

10:03:15 22 A. For the but for manual capture rate that I used, yes,

10:03:20 23 that's fair.

10:03:21 24 Q. And that was a date in January 2018, correct?

10:03:25 25 A. That's the date this 81.17 came from, that's fair.

10:03:29 1 Q. And you didn't pick January '17 when the rate was 65.62
10:03:37 2 percent for your calculation, correct?
10:03:39 3 A. No, I did not.
10:03:40 4 Q. You didn't pick July '17 when the rate was 58.62
10:03:45 5 percent, correct?
10:03:47 6 A. That's correct.
10:03:47 7 Q. You didn't pick July -- August '18 when the rate was
10:03:54 8 65 percent, correct?
10:03:56 9 A. That's correct.
10:03:56 10 Q. You picked the highest rate that you could find on this
10:04:02 11 demonstrative in front of you, correct?
10:04:05 12 A. Yes, and may I explain why?
10:04:07 13 Q. You may if you give me one moment.
10:04:10 14 Now, I want to explore down into the use of the
10:04:17 15 January '18, 81.17 date which is the highest number you
10:04:23 16 could possibly have chosen. And please turn to Tab 12 in
10:04:28 17 your binder, which is PX-0031.
10:04:30 18 A. I'm sorry, tab?
10:04:32 19 Q. Tab 12 in your binder, which is PX-0031.
10:04:48 20 A. Okay.
10:04:48 21 Q. Now, this is data that Ms. Lockwood-Stein presented,
10:04:55 22 correct?
10:04:55 23 A. Yeah, she discussed PX-0031.
10:04:57 24 Q. Well, she didn't discuss it, she actually brought it to
10:05:02 25 her deposition, correct?

10:05:03 1 A. Oh, yes, yes, she did.

10:05:05 2 Q. And, in fact, when she brought it to her deposition,

10:05:08 3 she listed it under the topic number of the value of auto

10:05:16 4 capture, correct? This is the document she had listed

10:05:19 5 under her agenda items as to the value of auto capture,

10:05:24 6 fair?

10:05:24 7 A. Oh, I don't know which items it was responsive to in

10:05:27 8 her deposition.

10:05:28 9 Q. Okay. We'll dig into that first.

10:05:31 10 A. Okay.

10:05:32 11 Q. So let's go to Tab 27 in your binder.

10:05:40 12 MR. SHEASBY: And why don't we pull up PX-0026?

10:05:48 13 Q. (By Mr. Sheasby) So PX-0026 is the notes that

10:05:54 14 Ms. Lockwood-Stein brought into her -- brought -- brought

10:05:57 15 in with her to her deposition, correct?

10:06:01 16 A. I believe so.

10:06:02 17 MR. SHEASBY: And why don't we pull up Topic 1.

10:06:08 18 Q. (By Mr. Sheasby) It says all facts relating to the

10:06:10 19 impact of the accused instrumentalities on Wells Fargo's

10:06:13 20 customer retention, customer acquisition, advertising, and

10:06:20 21 sale of other products or services. Correct?

10:06:22 22 A. That's what it states, yes.

10:06:24 23 Q. And the -- what she listed under that is image

10:06:28 24 acceptance rates, do you see that?

10:06:29 25 A. I do.

10:06:30 1 Q. And the image acceptance rates document that she's
10:06:33 2 referring to was that PX-0 -- that PX-document we were just
10:06:38 3 looking at, correct, that was PX-31, correct?

10:06:41 4 A. Yes, I believe that to be the case.

10:06:44 5 Q. Now, PX-31 has a large number of acceptance rates from
10:06:48 6 it for both manual and auto capture, correct?

10:06:51 7 A. Yes, it does.

10:06:52 8 MR. SHEASBY: And why don't we actually turn to
10:06:57 9 January 2018, which I believe is on Page 7 and 8 of that
10:07:03 10 document, Mr. Huynh. So let's just level set. Why don't
10:07:12 11 we pull up January '18. This is the Android data, and I
10:07:16 12 believe on the previous page, Mr. Huynh, you will find the
10:07:20 13 iOS data?

10:07:22 14 THE WITNESS: Excuse me.

10:07:30 15 Q. (By Mr. Sheasby) So just to level set, this is the
10:07:35 16 source of the data that you used for your 81 percent,
10:07:38 17 correct?

10:07:38 18 A. Yes.

10:07:41 19 Q. And if you see the -- for instance, in iOS, the video
10:07:54 20 rate of success was 90 percent in January 2018. Do you see
10:07:59 21 that, sir?

10:07:59 22 A. I do.

10:08:00 23 Q. Now, there is also a MiSnap manual number, correct?

10:08:03 24 A. For iOS, yes.

10:08:06 25 Q. That's 80.8 (sic) percent, correct?

10:08:08 1 A. For January of '18, yes, it is.

10:08:13 2 Q. Now, that's not a failed auto capture, the manual

10:08:16 3 still -- the manual number is the number where the folks

10:08:19 4 just take the picture, correct?

10:08:20 5 A. It's the -- it's the people that take the picture

10:08:27 6 before auto capture has a chance to finish its application.

10:08:30 7 Q. Sure. And auto capture, it will -- it has a 20 second

10:08:34 8 period of time before auto capture will -- will -- will log

10:08:37 9 out, correct?

10:08:38 10 A. That's my understanding.

10:08:41 11 Q. And we heard from Mr. Calman that it's three frames per

10:08:46 12 second, correct?

10:08:47 13 A. I don't remember the frames per second, sir.

10:08:50 14 Q. Okay. Now, what you did is you took the iOS manual

10:08:56 15 rate from January 2018, the iOS still rate from January

10:09:03 16 2018, and then you added the Android manual rate and the

10:09:08 17 Android still rate, correct, to get your 81 percent?

10:09:12 18 A. Yes, I believe that's the case.

10:09:15 19 Q. Now, you're an economist, correct?

10:09:18 20 A. Yes.

10:09:18 21 Q. And as an economist, you believe it's important to

10:09:21 22 fully explore the relevant data, correct?

10:09:24 23 A. Yes.

10:09:25 24 Q. And you'll see that in January of 2018, the -- there

10:09:33 25 were 553,000 iOS checks deposited through something called:

10:09:38 1 MiSnap unknown. Do you see that, sir?

10:09:40 2 A. Yes, I do.

10:09:48 3 Q. There were more checks deposited through MiSnap unknown

10:09:51 4 than were deposited through MiSnap still and manual. Take

10:09:54 5 that back. There were only a few more checks deposited in

10:09:58 6 MiSnap still and manual than were deposited in MiSnap

10:10:01 7 unknown, correct?

10:10:02 8 A. Based upon that month, yes.

10:10:05 9 Q. And you did absolutely nothing whatsoever in your

10:10:08 10 report to explain to the ladies and gentlemen of the jury

10:10:09 11 what MiSnap unknown were, correct?

10:10:12 12 A. Correct, I didn't explain what MiSnap unknown was.

10:10:16 13 Q. And so you don't know if MiSnap unknown was more manual

10:10:20 14 capture failures, correct?

10:10:21 15 A. Again, it's unknown.

10:10:24 16 Q. It's unknown because you didn't examine it, correct,

10:10:26 17 sir?

10:10:26 18 A. Well, no, I did ask in the context of my reviewing this

10:10:31 19 document what that was, and I was advised that it was

10:10:35 20 unknown.

10:10:36 21 Q. Who -- who -- who advised you of that, sir?

10:10:39 22 A. I don't recall who it was specifically. We spoke to

10:10:45 23 somebody at Wells Fargo about this data.

10:10:49 24 THE COURT: Let me -- let me interrupt for just a

10:10:52 25 minute. At this juncture, ladies and gentlemen, we're

10:10:54 1 going to take a short recess, and you can simply close your
10:10:58 2 notebooks and leave them in your chairs. Follow all the
10:11:00 3 instructions that I've given you, and we'll be back in here
10:11:03 4 shortly to continue. The jury is excused for recess.

10:11:06 5 COURT SECURITY OFFICER: All rise.

10:11:07 6 (Jury out.)

10:24:32 7 (Recess.)

10:24:33 8 COURT SECURITY OFFICER: All rise.

10:24:34 9 THE COURT: Be seated, please.

10:24:34 10 Are you prepared to continue, Mr. Sheasby?

10:24:43 11 MR. SHEASBY: I am, Your Honor.

10:24:44 12 THE COURT: You may return to the podium.

10:24:47 13 Let's bring in the jury, Mr. Johnston.

10:24:52 14 COURT SECURITY OFFICER: All rise.

10:25:16 15 (Jury in.)

10:25:16 16 THE COURT: Please be seated.

10:25:29 17 We'll continue with the Plaintiff's

10:25:33 18 cross-examination of the witness.

10:25:35 19 You may continue, Mr. Sheasby.

10:25:38 20 Q. (By Mr. Sheasby) We were looking at PX-031, correct?

10:25:42 21 A. Yes, sir.

10:25:42 22 Q. And we're talking about the fact that for your

10:25:46 23 81 percent manual capture rate, you chose the January 2018

10:25:51 24 date, correct?

10:25:52 25 A. That's correct.

10:25:52 1 Q. It's the highest date for manual capture on your
10:25:55 2 demonstrative, correct?
10:25:57 3 A. Yes, that's correct.
10:25:59 4 Q. And that date has this category of unknown MiSnap
10:26:06 5 events, correct?
10:26:07 6 A. Correct.
10:26:08 7 Q. And the rate -- the failure rate in those unknown
10:26:11 8 MiSnap events is incredibly high, correct?
10:26:16 9 A. Well, it's 41.89 percent.
10:26:20 10 Q. Is that the failure rate or the success rate, sir?
10:26:23 11 A. I'm sorry, yeah, correct, that's the success rate so it
10:26:26 12 would be the inverse.
10:26:27 13 Q. The failure rate is between 60 and 67 percent, correct?
10:26:31 14 A. For those unknown items, that's correct.
10:26:32 15 Q. And those unknown items are unknown, they're unknown by
10:26:37 16 you, correct?
10:26:37 17 A. Correct.
10:26:38 18 Q. They're unknown to the jury, correct?
10:26:40 19 A. Correct.
10:26:42 20 Q. Now, those are the only two entries, in fact, that's
10:26:45 21 the only -- only one of two months in this entire
10:26:48 22 Lockwood-Stein data in which there is unknown auto capture
10:26:55 23 information with these extremely high rates of failure,
10:26:57 24 correct?
10:26:57 25 A. I would have to look through the data and research that

10:27:00 1 specifically but without looking through the data --

10:27:04 2 Q. Please go ahead.

10:27:05 3 THE COURT: Let's make sure each of you finish

10:27:07 4 talking before the other one jumps in, please.

10:27:10 5 And to the extent you can slow down, Mr. Sheasby,

10:27:12 6 that would be helpful.

10:27:13 7 MR. SHEASBY: Yes, Your Honor.

10:27:23 8 Q. (By Mr. Sheasby) And to guide you, I believe the only

10:27:25 9 unknown events are in December 2017 and January 2018?

10:27:30 10 A. I'm sorry, could you repeat those dates again?

10:27:45 11 Q. Yes. So I believe December 7 -- December 2017 is the

10:27:52 12 other months that have these very large unknown failure

10:27:56 13 rates with unknown reasons, correct?

10:28:01 14 A. Well, there's several months with unknowns. But, yes,

10:28:07 15 December '17 does have a -- a higher rate. But there are

10:28:11 16 several months that have unknown data in there, as well.

10:28:14 17 Q. The December and January -- December 2017 and the

10:28:19 18 January 2018 dates are the times when there's these very

10:28:22 19 large number of checks being deposited through something

10:28:25 20 called unknown in which there's these very significant

10:28:33 21 failure rates, correct?

10:28:38 22 A. Based upon my quick review, that appears to be the

10:28:55 23 case.

10:28:56 24 Q. Now, you didn't need --

10:28:58 25 MR. SHEASBY: Why don't we pull those numbers

10:29:00 1 down, Mr. Huynh? And why don't we put back up PX -- why
10:29:05 2 don't we put up -- pull up ix-0032.10?

10:29:12 3 Q. (By Mr. Sheasby) So this is Schedule 7 to your report,
10:29:16 4 and you see there's the still and manual weighted averages
10:29:19 5 that you used on the right-hand corner. Do you see that?

10:29:22 6 A. I do.

10:29:23 7 Q. Now, you could have chosen any date in this line,
10:29:33 8 right, because you only chose one month for your
10:29:35 9 calculation, correct? You chose January 2018, correct?

10:29:39 10 A. I did, for the reasons I explained before.

10:29:43 11 Q. You chose January 2018, which has the highest
10:29:48 12 acceptance rates for manual to present your numbers to the
10:29:52 13 jury, correct?

10:29:53 14 A. Has the highest -- has the highest weighted average,
10:29:56 15 correct.

10:29:56 16 Q. That's the month in which there's these large number of
10:30:00 17 unknown MiSnap failures that no one knows the reason for,
10:30:06 18 correct?

10:30:06 19 A. That has the highest number of unknowns -- I don't know
10:30:11 20 if anybody knows the reason, but not that I'm aware of.

10:30:14 21 Q. You don't know?

10:30:15 22 A. Correct.

10:30:16 23 Q. I don't know?

10:30:16 24 A. Correct.

10:30:16 25 Q. The jury doesn't know?

10:30:17 1 A. Correct.

10:30:18 2 Q. And yet that was the single month with the highest

10:30:25 3 manual rate that you thought it was appropriate to use with

10:30:30 4 the jury, fair?

10:30:31 5 A. For the reasons I explained to you previously, that's

10:30:34 6 fair.

10:30:34 7 Q. So you would agree that when the jury goes back and

10:30:39 8 deliberates and thinks about your credibility, they're

10:30:43 9 entitled to consider the fact that you chose the highest

10:30:48 10 number from one month during the period for the manual

10:30:51 11 rate, correct?

10:30:51 12 A. I would hope that they would take into consideration

10:30:54 13 that and all the other data and information that I

10:30:56 14 presented to them that corroborated or supported my use of

10:31:00 15 that number.

10:31:01 16 MR. SHEASBY: Your Honor, I believe that answer

10:31:03 17 was non-responsive.

10:31:11 18 THE COURT: I'll sustain that objection.

10:31:14 19 Ask the question again.

10:31:15 20 Q. (By Mr. Sheasby) Sir, when the ladies and gentlemen of

10:31:18 21 the jury go to deliberate and think about your credibility,

10:31:22 22 they're entitled to consider the fact that you selected for

10:31:25 23 the manual capture success rate the highest manual capture

10:31:31 24 rate in the month of the highest unknown failures, fair?

10:31:34 25 A. That's the data that I used, that's correct.

10:31:40 1 Q. And they're allowed to consider that fact, fair?

10:31:42 2 A. Absolutely.

10:31:42 3 Q. They're allowed to consider the fact that there was all
10:31:46 4 this unknown failure dates in that month of January 2018,
10:31:50 5 correct?

10:31:50 6 A. Yes.

10:31:50 7 Q. They're allowed to consider the fact that you didn't
10:31:51 8 disclose that to them --

10:31:51 9 THE COURT: Slow down, Mr. Sheasby.

10:31:53 10 Q. (By Mr. Sheasby) They're allowed to consider the fact
10:31:55 11 that you didn't disclose it to them in your direct
10:31:57 12 examination, correct?

10:32:00 13 A. The unknown capture -- yes, that's correct.

10:32:03 14 Q. Now, I want to turn to --

10:32:20 15 MR. SHEASBY: Mr. Huynh, can we turn to Trial Date
10:32:23 16 10/31/19, beginning at 145, Line 11?

10:32:33 17 THE TECHNICIAN: Page number?

10:32:36 18 MR. SHEASBY: Page 145, Mr. Huynh.

10:32:40 19 Q. (By Mr. Sheasby) So you mentioned early that
10:32:44 20 Mr. Saffici, Wells Fargo's expert, testified by deposition,
10:32:47 21 correct?

10:32:47 22 A. Yes, he did.

10:32:48 23 Q. Mr. Saffici testified that you agree that the
10:32:53 24 patents-in-suit introduced autonomous monitoring and
10:32:56 25 corrective feedback techniques?

10:32:59 1 Answer: Yes.

10:33:03 2 Correct?

10:33:03 3 A. That's what he stated, yes.

10:33:05 4 Q. You have no basis to disagree with Mr. Saffici and you

10:33:08 5 didn't in your direct examination, correct, sir?

10:33:08 6 A. I'm sorry, your question?

10:33:09 7 Q. You didn't disagree with Mr. Saffici's opinion in your

10:33:12 8 direct examination, correct, sir?

10:33:15 9 A. No, I did not.

10:33:16 10 Q. Now, Mr. Saffici also testified that you agreed that

10:33:22 11 those -- referring to those features of the patent, are

10:33:26 12 referred to in the industry as auto capture, correct?

10:33:28 13 A. That's correct.

10:33:29 14 Q. And he said: I agree with that.

10:33:31 15 Correct?

10:33:31 16 A. Yes.

10:33:32 17 Q. This was Wells Fargo's expert, correct?

10:33:35 18 A. This is Mr. Saffici's testimony.

10:33:37 19 Q. And Mr. Saffici is a Wells Fargo expert, correct?

10:33:39 20 A. I believe so, yes.

10:33:42 21 Q. And he said he agreed that the USAA patents claim what

10:33:49 22 the industry refers to as auto capture.

10:33:51 23 And you voiced no disagreement with that in your

10:33:54 24 direct examination, correct, sir?

10:33:55 25 A. That's correct.

10:33:56 1 Q. And Mr. Saffici also agreed, and he doesn't dispute,
10:34:02 2 that Wells Fargo -- strike that.

10:34:05 3 Mr. Saffici, Wells Fargo's expert, testified that
10:34:08 4 he doesn't dispute that auto capture is widely acknowledged
10:34:12 5 as the foundation for a successful mobile check deposit.

10:34:17 6 Do you see that, sir?

10:34:18 7 A. I see what you're highlighting, yeah.

10:34:22 8 Q. Now, you do disagree with that, correct, sir?

10:34:25 9 A. Yes, I do.

10:34:26 10 MR. SHEASBY: Your Honor, may I approach?

10:34:28 11 THE COURT: Approach the bench or approach --

10:34:30 12 MR. SHEASBY: Yes, sir, approach the bench, Your
10:34:32 13 Honor.

10:34:32 14 THE COURT: Counsel, you may approach the bench.

10:34:33 15 (Bench conference.)

10:34:40 16 THE COURT: Going forward, please tell me where
10:34:43 17 you want to go.

10:34:43 18 MR. SHEASBY: I apologize. I've done it twice,
10:34:45 19 Your Honor. I'm sorry.

10:34:46 20 THE COURT: What's the issue?

10:34:47 21 MR. SHEASBY: Your Honor, I would now seek
10:34:49 22 permission from the Court to establish that Mr. Saffici is
10:34:53 23 a 34-year industry veteran in the banking industry with
10:34:57 24 significant remote deposit capture experience.

10:34:59 25 THE COURT: And how would you plan to do that with

10:35:01 1 this witness?

10:35:01 2 MR. SHEASBY: By showing him a portion of his
10:35:03 3 expert report without publishing it to the jury that solely
10:35:07 4 relates to his experience and nothing else.

10:35:10 5 THE COURT: Showing this witness a portion of --

10:35:12 6 MR. SHEASBY: Mr. Saffici's expert report where he
10:35:14 7 describes his experience. I will not publish it --

10:35:21 8 THE COURT: What's -- what's the response?

10:35:22 9 MS. WILLIAMS: We object to that. I mean, it's
10:35:24 10 not within this witness's personal knowledge. And there
10:35:26 11 was an opportunity for them to play that information with
10:35:29 12 Mr. Saffici's deposition, and that's been already
10:35:32 13 addressed.

10:35:32 14 THE COURT: I -- I agree with that. I'm going to
10:35:34 15 sustain the objection.

10:35:35 16 MR. SHEASBY: Thank you, Your Honor.

10:35:35 17 (Bench conference concluded.)

10:35:47 18 THE COURT: Let's proceed.

10:35:57 19 MR. SHEASBY: Mr. Huynh, can we turn to the next
10:35:59 20 page?

10:36:04 21 Q. (By Mr. Sheasby) Mr. Saffici testifies that he
10:36:09 22 considered himself an expert in the field of remote deposit
10:36:13 23 capture, correct, sir?

10:36:14 24 A. That's what he stated here.

10:36:17 25 Q. This is Wells Fargo's expert, correct, sir?

10:36:20 1 A. Apparently.

10:36:21 2 Q. You, on direct examination, did not tell the ladies and

10:36:27 3 gentlemen of the jury that you're an expert in the field of

10:36:30 4 remote deposit capture, correct, sir?

10:36:31 5 A. I think I was asked the question, but I'm not an expert

10:36:35 6 in remote deposit capture.

10:36:36 7 Q. So for the ladies and gentlemen of the jury,

10:36:39 8 Mr. Saffici, Wells Fargo's expert, testified under oath

10:36:42 9 that he's an expert in the field of remote deposit capture,

10:36:47 10 correct?

10:36:47 11 A. That's what he stated here.

10:36:48 12 Q. You testified under oath that you're not an expert in

10:36:51 13 the field of remote deposit capture, correct?

10:36:53 14 A. Correct.

10:36:54 15 Q. Mr. Saffici testified that --

10:37:03 16 MR. SHEASBY: Let's go back above, Mr. Huynh, to

10:37:06 17 the previous page.

10:37:07 18 Q. (By Mr. Sheasby) Mr. Saffici testified that auto

10:37:13 19 capture is widely acknowledged as the foundation for

10:37:15 20 successful mobile deposit. Under oath, he agreed to that?

10:37:20 21 A. That's what he stated here.

10:37:22 22 Q. He's Wells Fargo -- Wells Fargo's remote deposit

10:37:25 23 capture expert, correct, sir?

10:37:26 24 A. I don't know the extent of what his specific role was.

10:37:31 25 Q. But one thing we know for sure is that you are not

10:37:34 1 Wells Fargo's remote deposit capture expert, correct,
10:37:37 2 Mr. Gerardi?

10:37:37 3 A. No, sir, I'm the damages expert.

10:37:39 4 MR. SHEASBY: You can take that down, Mr. Huynh.

10:37:59 5 Now, why don't we turn to Calman Demonstrative
10:38:02 6 Slide 18, Mr. Huynh?

10:38:04 7 Q. (By Mr. Sheasby) Now, Mr. Calman actually went through
10:38:19 8 the process of calculating the averages for the data that
10:38:24 9 Ms. Lockwood-Stein prepared, correct?

10:38:29 10 A. No, no, this is saying source to the Ajami deposition
10:38:39 11 testimony. So I need to see if that was the document he
10:38:43 12 was referring to.

10:38:43 13 Q. Sir, you were here for his testimony, correct?

10:38:45 14 A. I was.

10:38:45 15 Q. You understood that he was testifying about the
10:38:47 16 Lockwood-Stein data, correct?

10:38:48 17 A. I don't recall that specifically.

10:38:52 18 Q. You don't recall Mr. Calman's testimony regarding the
10:38:55 19 Lockwood-Stein data, sir?

10:38:56 20 A. Oh, I do recall his testimony about the Lockwood-Stein
10:38:59 21 testimony. I just don't know if that's what he used
10:39:01 22 specifically for these numbers.

10:39:02 23 Q. Okay. In your direct examination, did you find any
10:39:07 24 dispute -- did you make any dispute whatsoever with the
10:39:13 25 number that the average manual capture failure rate on the

10:39:17 1 Lockwood-Stein data that you use is 30.52 percent?

10:39:25 2 A. I don't know if I can answer that without looking at my

10:39:28 3 data and performing my calculations. I can't say one way

10:39:31 4 or the other.

10:39:32 5 Q. So -- just so we're clear, you've relied on the

10:39:36 6 Lockwood-Stein data to present your analysis to the jury,

10:39:38 7 correct?

10:39:38 8 A. Yes. That's one piece of evidence, yes.

10:39:41 9 Q. You selected one month for that analysis, that's the

10:39:44 10 manual capture rate, correct?

10:39:45 11 A. For the reasons I explained, that's correct.

10:39:47 12 Q. The highest month, correct?

10:39:48 13 A. For the reasons I've explained, that's correct.

10:39:51 14 Q. And you didn't tell the ladies and gentlemen of the

10:39:52 15 jury what would be the average manual capture failure rate

10:39:55 16 if you would have averaged all the data in the

10:39:57 17 Lockwood-Stein data, correct?

10:39:58 18 A. That's not -- not something I presented, that's

10:40:01 19 correct.

10:40:01 20 Q. And so if the ladies and gentlemen of the jury want to

10:40:03 21 know what averages are in the document, they're going to

10:40:06 22 have to turn someplace else other than you; isn't that

10:40:09 23 correct, Mr. Gerardi?

10:40:11 24 A. Again, that's not something I presented.

10:40:24 25 MR. SHEASBY: Let's turn to PDX-4.9, Mr. Huynh.

10:40:37 1 Q. (By Mr. Sheasby) Sir, you were here in Mr. Weinstein's
10:40:42 2 direct examination; is that correct?
10:40:44 3 A. Yes, I was.
10:40:44 4 Q. Mr. Weinstein put up the damages statute that governs
10:40:48 5 damages in a patent case, correct?
10:40:49 6 A. Yes, he did.
10:40:50 7 Q. You agree that the jury is obligated to -- to award
10:40:57 8 no -- in no event less than a reasonable royalty, correct?
10:40:59 9 A. In no event -- no event less than a reasonable royalty
10:41:03 10 for the use made of the invention, that's correct.
10:41:05 11 Q. And to be clear, what the jury should focus on is the
10:41:09 12 use and benefit that Wells Fargo obtains from the
10:41:12 13 invention, correct?
10:41:12 14 A. For the specific use of the invention, that's correct.
10:41:14 15 Q. Now, the jury will hear that under a preponderance of
10:41:21 16 the evidence standard, correct?
10:41:22 17 A. That's a legal issue, so I'm not going to say yes or
10:41:27 18 no, but I believe that to be the case.
10:41:28 19 Q. Do you know -- what standard did you apply to determine
10:41:32 20 damages in this case?
10:41:33 21 A. What standard? Again, I looked to determine what the
10:41:38 22 damages were based upon the analyses that I performed.
10:41:41 23 Q. You didn't apply the preponderance of the evidence
10:41:43 24 standard?
10:41:45 25 MS. WILLIAMS: Objection, Your Honor.

10:41:46 1 THE COURT: What's your objection?

10:41:48 2 MS. WILLIAMS: This witness has no foundation to

10:41:50 3 be able to answer this question. He's already testified

10:41:53 4 that he doesn't have a legal background, and Your Honor is

10:41:56 5 going to instruct the jury about the weight here -- the

10:41:58 6 burden that is supposed to be applied and the weight that's

10:42:01 7 supposed to be given to the evidence.

10:42:02 8 THE COURT: Well, he can ask the witness if he

10:42:05 9 applied the preponderance standard. And if the witness

10:42:05 10 says he did, he did. If he says he didn't or if he says I

10:42:08 11 don't know. He can answer the question.

10:42:10 12 MS. WILLIAMS: Yes, Your Honor.

10:42:10 13 THE COURT: Overruled.

10:42:11 14 Q. (By Mr. Sheasby) Please answer the question.

10:42:12 15 A. So based upon that legal construct, yes, I believe I

10:42:17 16 applied the preponderance of the evidence.

10:42:18 17 Q. But I thought you just told me you didn't know what

10:42:24 18 preponderance of the evidence was?

10:42:24 19 A. I said I wasn't trying to interpret that for a legal

10:42:27 20 standard, but yes, I applied the evidence and put weight

10:42:33 21 that I believed to be quoted in the documents and the

10:42:34 22 information I've seen.

10:42:34 23 Q. Do you know what the preponderance of the evidence

10:42:35 24 standard is?

10:42:35 25 A. Balance of the evidence.

10:42:37 1 Q. And do you know if the evidence tips ever so slightly
10:42:41 2 in favor of Plaintiff what the result is?

10:42:43 3 A. I believe that would be a preponderance of the
10:42:45 4 evidence. But, again, I'm not rendering a legal
10:42:48 5 interpretation of that.

10:42:49 6 THE COURT: All right. We've gotten into this
10:42:50 7 legal issue enough. Let's move on.

10:42:52 8 MR. SHEASBY: Thank you, Your Honor.

10:42:53 9 Q. (By Mr. Sheasby) Now, there are two types of
10:42:56 10 infringements being asserted in this case, there's
10:42:59 11 infringement under the literal standard, correct?

10:43:01 12 A. That's my understanding, yes.

10:43:02 13 Q. There's also infringement under the Doctrine of
10:43:05 14 Equivalents standard, correct?

10:43:05 15 A. That's my understanding.

10:43:08 16 Q. And the same amount of damages apply under either,
10:43:16 17 correct?

10:43:16 18 A. I believe it's a legal issue, but I'm not -- I'm not
10:43:22 19 making a distinction between whether it's an infringement
10:43:26 20 under direct or literal infringement.

10:43:28 21 Q. In other words, there's no Doctrine of Equivalents
10:43:30 22 discount, correct? If the patent is infringed literally
10:43:33 23 under the Doctrine of Equivalents in your analysis, you
10:43:36 24 agree that the same amount of damages should be applied,
10:43:38 25 fair?

10:43:38 1 A. Fair.

10:43:40 2 Q. Now, in the hypothetical negotiation, the patent is

10:43:46 3 assumed valid, enforceable and infringed, correct, sir?

10:43:49 4 A. That's correct.

10:43:51 5 Q. And so if the jurors think infringement is a close

10:43:56 6 case, when they turn to damages, they must assume that the

10:44:01 7 patent is infringed, valid, and enforceable, correct?

10:44:06 8 A. In the context of preparing my analyses, I have to

10:44:10 9 assume for damages to be awarded, that the patent is found

10:44:13 10 to be valid, enforceable, and infringed.

10:44:16 11 Q. And you agree that's the same analysis -- you believe

10:44:19 12 that's the same analysis the jury should do, fair?

10:44:22 13 A. Again, in considering damages, you don't get to damages

10:44:27 14 unless there's infringement, and so I'm presenting my

10:44:30 15 analysis with the assumption that the patents are valid,

10:44:35 16 enforceable, and infringed.

10:44:36 17 Q. Now, you agree that the patents are quite valuable,

10:44:51 18 correct, sir?

10:44:52 19 Strike that.

10:44:53 20 You agree that some patents are quite valuable,

10:44:57 21 correct, sir?

10:44:57 22 A. Are you talking about in a general context, sir?

10:45:00 23 Q. Yes, sir.

10:45:01 24 A. Yes.

10:45:01 25 Q. And you agree some patents are worth hundreds of

10:45:04 1 millions of dollars, correct, sir?

10:45:05 2 A. They absolutely could be, in a general sense.

10:45:09 3 Q. Now, as part of the hypothetical negotiation, the

10:45:14 4 parties will consider the benefit Wells Fargo received from

10:45:17 5 the technology, correct, sir?

10:45:19 6 A. That's the predicate that I've used in my analysis,

10:45:22 7 yes.

10:45:23 8 MR. SHEASBY: And let's pull up PDX-4 -- let's --

10:45:29 9 let's pull up PDX-4.18, Mr. Huynh.

10:45:33 10 Q. (By Mr. Sheasby) Mr. Weinstein identified three types

10:45:43 11 of damages, cost savings, increased profits, and ecosystem

10:45:47 12 benefits, correct?

10:45:49 13 A. That's my understanding, yes.

10:45:51 14 Q. You attribute no ecosystem benefit to auto capture

10:45:55 15 MRDC, correct?

10:45:57 16 A. For the reasons that I've explained, that's correct.

10:45:59 17 Q. You attribute no value whatsoever to the increased

10:46:04 18 profits from auto capture MRDC, correct, sir?

10:46:06 19 A. In the context of my analyses, that's correct.

10:46:11 20 Q. Why don't we turn to PDX -- PX-7, which is Tab 25 in

10:46:20 21 your binder.

10:46:33 22 MR. SHEASBY: And why don't we turn the page,

10:46:38 23 Mr. Huynh, to Page 11?

10:46:46 24 Q. (By Mr. Sheasby) So Wells Fargo's documents identify a

10:46:57 25 number of primary benefits to Wells Fargo of MRDC, correct?

10:47:05 1 A. These expectations -- they're aspirations for MRDC,
10:47:10 2 correct.

10:47:10 3 Q. Channel optimization, that's another name for cost
10:47:14 4 savings, correct?

10:47:14 5 A. Yes.

10:47:14 6 Q. Deposit balance growth, that's about how MRDC can
10:47:18 7 increase profits, correct?

10:47:19 8 A. How MRDC could potentially increase profits, that's
10:47:24 9 correct.

10:47:24 10 Q. And brand positioning reputation, that's about how --
10:47:27 11 that relates to what some might call as the ecosystem
10:47:34 12 effect, correct, sir?

10:47:35 13 A. In a general construct, yes.

10:47:37 14 MR. SHEASBY: And so let's pull that down.

10:47:38 15 Q. (By Mr. Sheasby) And to be clear, you didn't assign
10:47:41 16 any in your analysis -- in your damage analysis, you didn't
10:47:44 17 assign any ecosystem benefit based on the patents-in-suit,
10:47:47 18 correct?

10:47:47 19 A. No, and may I explain?

10:47:50 20 Q. Sir, the answer -- you may. I'll get right back to it.

10:47:58 21 You also didn't assign any value to any -- to
10:48:02 22 the -- to the auto capture patents based on any profits
10:48:05 23 that may have been created by MRDC, correct, sir?

10:48:07 24 A. That were created by MRDC? No, that's correct.

10:48:10 25 Q. Yes. Now, one of the other --

10:48:14 1 A. That were created by auto capture, that's correct.

10:48:15 2 Q. No, sir, I was actually asking you a different
10:48:21 3 question.

10:48:21 4 In your damages analysis, you didn't consider any
10:48:24 5 profits that were generated by MRDC, correct?

10:48:26 6 A. I would disagree with that.

10:48:31 7 Q. So you agree that MRDC has generated profits, correct,
10:48:36 8 sir?

10:48:36 9 A. I would agree that looking at MRDC and the benefits of
10:48:42 10 moving from manual capture to auto capture would
10:48:44 11 potentially increase profits because it has lower costs of
10:48:49 12 processing.

10:48:50 13 Q. You didn't -- you didn't explore any profits associated
10:48:53 14 with deposit growth or increased spending by the customer,
10:48:57 15 correct?

10:48:57 16 A. Of those two specific items? No, I did not.

10:48:59 17 Q. Okay. Now, you also criticized Mr. Calman's discussion
10:49:05 18 of the 40 percent value that he attributed as a technical
10:49:09 19 matter to auto capture, correct?

10:49:10 20 A. I criticized his use of the 40 percent that he's
10:49:17 21 attributing to auto capture.

10:49:19 22 Q. Now, you did not ask -- ask Dr. Villasenor to render an
10:49:23 23 opinion as to whether Mr. Calman's assessment that
10:49:27 24 40 percent of the value of MRDC is auto capture, correct?

10:49:30 25 A. No, I did not.

10:49:31 1 Q. You did not ask Mr. Villasenor, any other technologist
10:49:36 2 anywhere in the world, to analyze from a technical
10:49:40 3 perspective Mr. Calman's analysis, correct?
10:49:43 4 A. That's fair.
10:49:43 5 Q. You did not ask Mr. Saffici, correct?
10:49:45 6 A. No, I did not.
10:49:46 7 Q. You did not ask any Wells Fargo technologist, correct?
10:49:50 8 A. Wells Fargo technologist? No, I did not.
10:49:53 9 Q. From a technical perspective in terms of technical
10:49:57 10 components, you are not qualified to evaluate the impact of
10:50:02 11 auto capture on MRDC, correct, sir?
10:50:07 12 A. From a technical perspective in terms of the -- the
10:50:14 13 mechanical and -- and software/hardware parts of the
10:50:19 14 system, no, I am not.
10:50:20 15 Q. Sir, from a technical perspective in terms of technical
10:50:24 16 components, you are not qualified to evaluate the impact of
10:50:28 17 auto capture on MRDC, yes or no?
10:50:33 18 A. In that definition of technical, that's correct.
10:50:37 19 Q. Now, Mr. Calman performed some analysis in which he
10:51:07 20 concludes that auto capture, if it was turned off, it would
10:51:15 21 be unaccessible -- unacceptable to consumers, correct?
10:51:18 22 A. I have a general understanding, yes, that's correct.
10:51:21 23 Q. You're not an expert in mobile remote deposit capture,
10:51:25 24 correct, sir?
10:51:25 25 A. In terms of the technical aspects of it, no.

10:51:28 1 Q. You said previously you're not an expert in mobile
10:51:34 2 remote deposit capture, correct, sir?

10:51:35 3 A. That's correct.

10:51:35 4 Q. And you didn't ask any technologist, anyone who is an
10:51:41 5 expert in mobile remote deposit capture, such as
10:51:44 6 Mr. Villasenor who is independent in this case, whether
10:51:46 7 Mr. Calman was correct or incorrect, fair?

10:51:48 8 A. From a technical perspective, that's correct.

10:51:50 9 MR. SHEASBY: Your Honor, I pass the witness.

10:51:52 10 THE COURT: All right. Is there redirect,
10:51:54 11 Ms. Williams?

10:51:55 12 MS. WILLIAMS: Yes, Your Honor.

10:51:56 13 THE COURT: All right. Proceed with your redirect
10:51:58 14 examination.

10:51:58 15 MS. WILLIAMS: Thank you, Your Honor.

10:51:58 16 REDIRECT EXAMINATION

10:51:59 17 BY MS. WILLIAMS:

10:51:59 18 Q. Mr. Gerardi, counsel for USAA discussed your opinion on
10:52:17 19 the commercial viability of manual capture as a
10:52:19 20 non-infringing alternative. Is this an analysis -- kind of
10:52:22 21 analysis that you've done before?

10:52:24 22 A. Oh, yes, scores of times.

10:52:25 23 Q. And what is the technical expert's role in that kind of
10:52:31 24 analysis?

10:52:31 25 A. The technical expert's role to me is to help me

10:52:34 1 understand the technological aspects of it. My role as the
10:52:40 2 damages expert is to analyze the economics and the
10:52:44 3 financial business side of it.

10:52:45 4 Q. Is that why you talked to Dr. Villasenor?

10:52:48 5 A. Yes, again to understand the technical aspects of the
10:52:50 6 product.

10:52:50 7 Q. Did he have to offer a formal report or opinion to have
10:52:54 8 the discussion with you about whether manual capture was
10:52:59 9 not infringing?

10:53:00 10 A. No, he did not.

10:53:02 11 Q. Is there any real disagreement that manual capture does
10:53:05 12 not infringe?

10:53:06 13 A. I don't think there is, no.

10:53:07 14 Q. Is there any disagreement that it is technologically
10:53:17 15 feasible to do manual capture?

10:53:20 16 A. No. Again, I think we've seen that Wells Fargo has
10:53:24 17 actually deployed and working with and had a fully
10:53:28 18 operational mobile deposit -- or mobile remote deposit
10:53:31 19 capture system using manual capture.

10:53:33 20 Q. And what is your role in the analysis of determining
10:53:41 21 commercial acceptance of a non-infringing alternative?

10:53:44 22 A. Again, is to evaluate the economics and the business
10:53:47 23 aspects of one system versus the other.

10:53:49 24 Q. And in this case, why did you determine that manual
10:53:55 25 capture is commercially acceptable?

10:53:57 1 A. Oh, for the reasons that we talked about previously. I
10:54:01 2 can see that Wells Fargo spent several years evaluating
10:54:07 3 this type of system and made an informed decision and spent
10:54:11 4 a lot of money to come to the market with a manual capture
10:54:15 5 remote deposit system. And they, in fact, deployed that
10:54:17 6 system in the market, so it -- it worked. It exceeded
10:54:20 7 their expectations.

10:54:21 8 And so from an economic perspective, that, to me,
10:54:25 9 indicates that there was an acceptable product that was
10:54:27 10 viable and that was workable.

10:54:29 11 Q. You were asked some questions about Mr. Ajami's
10:54:32 12 testimony, do you recall that?

10:54:35 13 A. Yes.

10:54:35 14 Q. In -- in any of the testimony that you've reviewed from
10:54:38 15 Mr. Ajami, have you ever heard him talk about USAA's
10:54:43 16 version of auto capture as part of his statement related to
10:54:49 17 the Futurion Report?

10:54:49 18 A. No.

10:55:04 19 MS. WILLIAMS: May we have PX-31, please?

10:55:11 20 Q. (By Ms. Williams) Mr. Gerardi, you were asked a number
10:55:17 21 of questions about -- about PX-31 in your selection of
10:55:24 22 81.17 percent as the manual capture acceptance rate. Why
10:55:30 23 did you feel comfortable using 81.17 percent even with the
10:55:40 24 line item of MiSnap unknowns?

10:55:42 25 A. I couldn't hear -

10:55:42 1 Q. Excuse me?

10:55:42 2 A. I couldn't hear the last part of your sentence, I'm
10:55:44 3 sorry.

10:55:44 4 Q. Oh. You were asked a number of questions about PX-31.

10:55:49 5 A. Yes.

10:55:50 6 Q. And why did you feel comfortable using the data at

10:55:54 7 PX-31 in arriving at 81.17 percent even with the MiSnap
10:56:00 8 unknown line item in that January 2018 section of the --

10:56:05 9 PX-31?

10:56:06 10 A. Because the unknown means I got unknown. We just don't
10:56:09 11 know what it is, and there's no way for me to determine how
10:56:12 12 that affected auto, how that affected the other manuals or
10:56:17 13 not. So I just -- I had no reason to base -- to use that
10:56:23 14 in my calculus.

10:56:24 15 Q. Did you look at other information to corroborate the
10:56:28 16 81.17 percent?

10:56:28 17 A. Oh, yes. We discussed several of those pieces of
10:56:31 18 corroborating evidence previously.

10:56:32 19 Q. And what are those?

10:56:33 20 A. Oh, you have USAA's performance with its manual
10:56:40 21 capture. There were US -- Wells Fargo's -- so we have it
10:56:45 22 here. USAA's manual acceptance rate. There was the MiSnap
10:56:51 23 information that did -- that identified the expected
10:56:55 24 improvement going from manual to auto capture. There was
10:56:57 25 this document from USAA.

10:57:00 1 Again -- I'm sorry, just go back if we could,
10:57:02 2 please, once. Again, clearly demonstrating for that period
10:57:06 3 of time, USAA's manual capture success rate and the
10:57:11 4 difference.

10:57:13 5 THE WITNESS: Next, please.

10:57:14 6 A. And, again, based upon US -- Wells Fargo's own
10:57:17 7 experience for that limited time period, again, they had
10:57:21 8 approximately an 80 percent acceptance rate there. And a 6
10:57:26 9 percent improvement there.

10:57:27 10 And Mr. Bueche's testimony that USAA experienced
10:57:31 11 an 81 percent manual capture rate when their auto capture
10:57:36 12 system didn't work.

10:57:38 13 Q. (By Ms. Williams) Did you look at this 81.17 percent
10:57:41 14 in isolation?

10:57:42 15 A. Oh, no, not at all.

10:57:47 16 MS. WILLIAMS: May we have PX-7, please?

10:57:53 17 Q. (By Ms. Williams) Do you recall reviewing this
10:57:58 18 document with counsel for USAA?

10:58:00 19 A. Yes, I do.

10:58:00 20 Q. What's the date of this document?

10:58:02 21 A. January 2011.

10:58:04 22 Q. Was auto capture used in January 2011?

10:58:09 23 A. No, it was not.

10:58:10 24 Q. Was the form of capture being considered as part of
10:58:15 25 this review in January 2011?

10:58:19 1 A. It was manual capture.

10:58:23 2 Q. Is -- is there anything that you saw in this report

10:58:26 3 that links the benefits to auto capture?

10:58:29 4 A. No, not at all.

10:58:32 5 Q. At the time of the benefits described in this document,

10:58:37 6 what was the form of capture available?

10:58:40 7 A. Again, it would have been manual capture MRDC.

10:58:53 8 MS. WILLIAMS: Your Honor, may I have a moment?

10:58:55 9 THE COURT: You may.

10:59:09 10 MS. WILLIAMS: Thank you, Your Honor.

10:59:10 11 May we go back to PX-31, please?

10:59:13 12 Q. (By Ms. Williams) Counsel for USAA showed you that

10:59:23 13 there are -- highlighted for you that there are lower

10:59:25 14 numbers in PX-31 for MiSnap still and MiSnap manual. Do

10:59:30 15 you recall that?

10:59:30 16 A. I do.

10:59:32 17 Q. And why didn't you rely on those low numbers in

10:59:37 18 determining what the acceptance rate would be in your

10:59:41 19 analysis for manual capture?

10:59:42 20 A. I'm sorry, could you repeat your question?

10:59:45 21 Q. Why didn't you rely on the lower rates in PX-31 to

10:59:50 22 determine your manual acceptance rate?

10:59:52 23 A. So, again --

10:59:53 24 MR. SHEASBY: Your Honor, I object. Outside the

10:59:56 25 scope of the report.

10:59:56 1 THE COURT: What's your response, Ms. Williams?

10:59:59 2 MS. WILLIAMS: I'm sorry, I didn't hear the
11:00:00 3 objection.

11:00:00 4 THE COURT: Well, apparently, people are not
11:00:02 5 hearing very well in here.

11:00:04 6 The objection was that the question calls for
11:00:08 7 testimony that's beyond the scope of this expert's report.

11:00:11 8 MS. WILLIAMS: That is not -- I disagree, Your
11:00:13 9 Honor. I can provide you with the -- the section number.

11:00:18 10 THE COURT: All right. Please do so.

11:00:33 11 Counsel, approach the bench, please.

11:00:35 12 (Bench conference.)

11:00:41 13 MS. WILLIAMS: Your Honor, he's already testified
11:00:43 14 as to why the rates are lower, and he has -- he has in --
11:00:55 15 one of his paragraphs in his report, he discusses this
11:00:58 16 conversation that he had with Ms. Lockwood-Stein and her
11:01:01 17 testimony about what the compromise major is of the MiSnap
11:01:06 18 manual and the MiSnap still and why that they are
11:01:10 19 artificially low. And he's already testified to that on
11:01:14 20 direct, Your Honor, without objection, and it is in his
11:01:16 21 report.

11:01:16 22 MR. SHEASBY: That was in the section of his
11:01:17 23 report that was stricken. I didn't make the objection
11:01:20 24 previously. I think it was a different question.

11:01:22 25 THE COURT: The question -- the issue before me

11:01:24 1 now is Mr. Sheasby's objection goes to your question,
11:01:29 2 Ms. Williams, which is why didn't you use the lower
11:01:32 3 percentage numbers reflected in this PX-31. If there's a
11:01:35 4 section in his report where he discusses PX-31 and explains
11:01:39 5 why he used the high end of the numbers and not the low end
11:01:43 6 of the numbers, then I need to see that.

11:01:45 7 MS. WILLIAMS: So, Your Honor, with Your Honor's
11:01:48 8 instruction or order at the pre-trial conference, he was
11:01:51 9 instructed to use PX-31 for the manual capture number. And
11:01:55 10 so he -- and so that is -- at the pre-trial conference, you
11:02:02 11 indicated or you asked counsel for USAA if there was going
11:02:05 12 to be any objection about that number -- about the
11:02:08 13 information in the report going forward, and he indicated
11:02:10 14 that there wasn't going to be.

11:02:12 15 So --

11:02:13 16 THE COURT: This is not an objection as to PX-31.

11:02:17 17 MS. WILLIAMS: Uh-huh.

11:02:18 18 THE COURT: It's an objection that based on PX-31,
11:02:21 19 did this witness, Mr. Gerardi, discuss in his report the --
11:02:26 20 the use or rationale not to use the lower end of the
11:02:31 21 numbers reflected in PX-31 than the higher end, which he
11:02:35 22 did use.

11:02:36 23 MS. WILLIAMS: Yes, Your Honor.

11:02:37 24 THE COURT: That's the question. Is that in his
11:02:39 25 report?

11:02:39 1 MS. WILLIAMS: Yes, Your Honor. He described Ms.
11:02:41 2 Lockwood -- his conversations with Ms. Lockwood-Stein and
11:02:45 3 her testimony about --
11:02:46 4 THE COURT: Show me.
11:02:47 5 MS. WILLIAMS: Yes, Your Honor.
11:02:49 6 MR. SHEASBY: Your Honor, that was the section
11:02:50 7 stricken --
11:02:51 8 THE COURT: Well, let's see -- let her identify
11:02:55 9 the section, and then we'll determine if it's a live part
11:02:59 10 of the report.
11:03:00 11 MS. WILLIAMS: Just bear with me, Your Honor.
11:03:00 12 MR. SHEASBY: I'll help you with -- -
11:03:03 13 THE COURT: No, Mr. Sheasby, it's not your job to
11:03:03 14 help her look.
11:03:23 15 If I need to send the jury out and give you time
11:03:25 16 to put this at your table and look through it, I will.
11:03:28 17 That's what I talked about in pre-trial, why these kind of
11:03:31 18 objections are so problematic.
11:03:33 19 If you can find it quickly, Ms. Williams, that's
11:03:35 20 great. If you can't, I don't want to disadvantage you by
11:03:39 21 not giving you time to look.
11:03:42 22 MS. WILLIAMS: Yes, Your Honor.
11:03:42 23 May I please have a minute to look, Your Honor?
11:03:44 24 THE COURT: Yes. I'll send the jury out, and you
11:03:46 25 go to your counsel table and look at it.

11:03:50 1 MS. WILLIAMS: Yes, Your Honor. Thank you.

11:03:52 2 (Bench conference concluded.)

11:03:52 3 THE COURT: Ladies and gentlemen, this may take

11:03:53 4 some additional time. I'm not going to require that you

11:03:56 5 sit in the jury box during this process.

11:03:59 6 So you may close your notebooks and retire to the

11:04:02 7 jury room. I'll have you back in here as quickly as

11:04:06 8 possible once I've covered this with counsel. Follow all

11:04:09 9 the instructions I've given you, including not to discuss

11:04:11 10 the case among yourselves.

11:04:13 11 The jury should retire to the jury room.

11:04:17 12 COURT SECURITY OFFICER: All rise.

11:04:18 13 (Jury out.)

11:04:19 14 THE COURT: Be seated, please.

11:04:42 15 While the jury is out of the jury room, I'll

11:05:00 16 take -- or out of the courtroom, rather, I'll take this

11:05:03 17 opportunity to update counsel.

11:05:05 18 Plaintiff has 2 hours and 20 minutes remaining.

11:05:07 19 Defendant has 1 hour and 25 minutes remaining.

11:05:17 20 MR. MELSHEIMER: Thank you, Your Honor.

11:05:18 21 MR. SHEASBY: Thank you, Your Honor.

11:07:48 22 MS. WILLIAMS: Your Honor, may we approach?

11:07:49 23 THE COURT: There's no need to. The jury is not

11:07:53 24 in the courtroom.

11:07:53 25 MS. WILLIAMS: Oh, yes, Your Honor.

11:07:54 1 THE COURT: Tell me what you have, Ms. Williams.

11:07:56 2 MS. WILLIAMS: So in Paragraph 143 and in 2 --

11:08:10 3 143, he discusses his criticisms. And then also -- or,

11:08:15 4 excuse me, he discusses his criticisms of the data that

11:08:18 5 Mr. Calman relied on.

11:08:21 6 And then also talks about the reliance on the

11:08:27 7 manual and still mode in Paragraph 263.

11:08:32 8 THE COURT: Is there anything specific in his

11:08:33 9 report that identifies why he did not use the lower numbers

11:08:38 10 reflected on PX-31 in place of the higher number that he's

11:08:43 11 testified to?

11:08:44 12 MS. WILLIAMS: Not -- not in the way that Your

11:08:48 13 Honor has phrased it, but in the context of criticizing

11:08:52 14 Mr. Calman's reliance on those numbers, there is. But I'm

11:08:56 15 happy to withdraw the question, Your Honor, and ask another

11:08:58 16 one.

11:08:58 17 THE COURT: Well, your question was specifically

11:09:01 18 targeted to PX-31 which you had put on the screen --

11:09:01 19 MS. WILLIAMS: Yes, Your Honor.

11:09:04 20 THE COURT: -- at your instruction. And unless --

11:09:07 21 unless there's a clear discussion of this exhibit,

11:09:10 22 establishing why this witness chose to use the high end of

11:09:13 23 the numbers reflected on this exhibit as opposed to the low

11:09:16 24 end, then I'll have -- I'll sustain the objection, or you

11:09:20 25 can withdraw the question.

11:09:21 1 MS. WILLIAMS: I'll withdraw the question, Your
11:09:23 2 Honor.

11:09:23 3 THE COURT: All right. I'm going to bring the
11:09:24 4 jury back in. I think they're entitled to know the
11:09:26 5 resolution of this. So you should withdraw the question
11:09:29 6 once the jury is back in the box.

11:09:31 7 MS. WILLIAMS: Yes, Your Honor.

11:09:31 8 THE COURT: All right. All right. Let's bring
11:09:40 9 the jury back.

11:09:49 10 (Off the record discussion.)

11:09:55 11 THE COURT: And I'll charge this time consumed in
11:10:05 12 this process to the Defendant.

11:10:14 13 COURT SECURITY OFFICER: All rise.

11:10:15 14 (Jury in.)

11:10:15 15 THE COURT: Please be seated.

11:10:34 16 Ms. Williams, it's my understanding that you wish
11:10:43 17 to withdraw the question that led to the objection by Mr.
11:10:46 18 Sheasby?

11:10:47 19 MS. WILLIAMS: Yes, Your Honor.

11:10:48 20 THE COURT: The question is withdrawn. Ask your
11:10:51 21 next question.

11:10:52 22 MS. WILLIAMS: Thank you, Your Honor.

11:10:56 23 Q. (By Ms. Williams) Mr. Gerardi, counsel for USAA
11:10:58 24 discussed with you that Mr. Calman's opinion that manual
11:10:58 25 capture is not accepted -- is not acceptable. Do you

11:11:01 1 remember that?

11:11:01 2 A. I do.

11:11:01 3 Q. Now, are you an expert in the economic acceptability in

11:11:05 4 the market of technology?

11:11:06 5 A. I'm an expert in evaluating the -- the market for

11:11:12 6 technology, yes.

11:11:12 7 Q. By looking at consumer behavior in the market, what did

11:11:15 8 you conclude about whether the market would accept manual

11:11:19 9 capture as an alternative to the manual MRDC system --

11:11:23 10 excuse me, auto capture system?

11:11:24 11 A. As I explained previously, it already had. I mean,

11:11:30 12 Wells Fargo already had an existing manual deposit

11:11:34 13 remote -- manual capture remote deposit system in place,

11:11:34 14 and it was successful at that point in time.

11:11:37 15 Q. Would the parties at the hypothetical negotiation know

11:11:41 16 this information and consider it?

11:11:43 17 A. Absolutely.

11:11:43 18 Q. You were asked some questions about Doctrine of

11:11:49 19 Equivalents and direct infringement. Do you recall those

11:11:51 20 questions?

11:11:51 21 A. Yes, I do.

11:11:53 22 Q. And so if -- if the jury doesn't find that there is

11:11:57 23 infringement by Wells Fargo, what are the damages in this

11:12:00 24 case?

11:12:00 25 A. Zero.

11:12:01 1 Q. And if the jury doesn't find that there's infringement
11:12:04 2 under the Doctrine of Equivalents, what are the damages in
11:12:07 3 this case?

11:12:08 4 A. Zero.

11:12:10 5 MS. WILLIAMS: Your Honor, I pass the witness.

11:12:13 6 THE COURT: All right. Is there additional
11:12:15 7 cross-examination?

11:12:16 8 MR. SHEASBY: Your Honor, Plaintiff have no
11:12:17 9 further questions of this witness.

11:12:18 10 THE COURT: Then, Mr. Gerardi, you may step down.

11:12:21 11 THE WITNESS: Thank you, sir.

11:12:24 12 MR. MELSHEIMER: Your Honor, may we approach
11:12:25 13 briefly on a housekeeping matter?

11:12:27 14 THE COURT: Approach the bench.

11:12:29 15 (Bench conference.)

11:12:49 16 THE COURT: Let's talk into these microphones,
11:12:51 17 please.

11:12:51 18 MR. MELSHEIMER: Yes, Your Honor. So we're --
11:12:53 19 we're prepared to rest our evidence, Your Honor, subject to
11:12:56 20 an offer of proof about some previously excluded evidence
11:12:59 21 and testimony. But I assume we'll be allowed to do that --

11:13:05 22 THE COURT: Outside the presence of the jury.

11:13:06 23 MR. MELSHEIMER: -- outside the presence of the
11:13:08 24 jury, of course. Your Honor, the only issue, the reason
11:13:10 25 why I'm up here is because there was a brief filed at 6:00

11:13:14 1 o'clock this morning arguing that something Dr. Villasenor
11:13:17 2 had said had opened the door to an instruction from the
11:13:22 3 Court. I guess I'm a little concerned that -- first of
11:13:26 4 all, that objection was -- there was no objection raised
11:13:28 5 during his testimony to that --

11:13:30 6 THE COURT: Let me stop you, Mr. Melsheimer. I
11:13:32 7 haven't thoroughly reviewed it since it only came in this
11:13:36 8 morning, but my understanding, it goes to the issue of what
11:13:39 9 the Court will instruct the jury on as a part of its
11:13:43 10 charge; is that correct? Is that the request that it be
11:13:45 11 included in the charge?

11:13:46 12 MR. SHEASBY: Yes, Your Honor. It's purely a
11:13:48 13 legal issue for the charge.

11:13:49 14 MR. MELSHEIMER: It is, Your Honor, except that
11:13:53 15 I -- if the Court -- well, our concern is --

11:13:56 16 THE COURT: I'm not going to take up
11:13:58 17 charge-related issues right now.

11:14:00 18 MR. MELSHEIMER: Well, Your Honor, I understand
11:14:02 19 that. I'm not asking you to.

11:14:03 20 THE COURT: Okay.

11:14:04 21 MR. MELSHEIMER: All I'm saying is we were
11:14:05 22 prepared to rest our case. If there's going to be a change
11:14:08 23 in what the parties are anticipating and have long
11:14:10 24 anticipated about what the jury is going to be told, you
11:14:14 25 know, Dr. Villasenor has been released. I guess we could

11:14:17 1 try to go get him back here to clarify or explain his
11:14:20 2 testimony. That's the concern I'm raising with the Court
11:14:23 3 is that --

11:14:24 4 THE COURT: Here's -- here's my short answer,
11:14:26 5 Mr. Melsheimer. The Court's not going to be compelled to
11:14:30 6 address what it is or isn't going to include in its charge
11:14:35 7 before you rest your case so that you'll know what you need
11:14:38 8 or don't need to put on in evidence. That's not the way it
11:14:41 9 works. You choose what to put before the jury just as the
11:14:45 10 Plaintiff will choose what if anything to put in his
11:14:48 11 rebuttal case, and then when all the evidence is in for the
11:14:51 12 first time, the Court will take up based on that evidence
11:14:55 13 what the Court believes is an appropriate and fair charge
11:14:58 14 to the jury will be. But I'm not going to be put in a
11:15:01 15 position of having to say yes or no now on an issue related
11:15:05 16 to what's appropriate for the charge so you can feel better
11:15:06 17 or worse about what evidence you've put on or not put on.

11:15:09 18 MR. MELSHEIMER: Your Honor, I'm not -- I'm not
11:15:11 19 making this point well. And I apologize.

11:15:14 20 THE COURT: That's the way it seems to me.

11:15:16 21 MR. MELSHEIMER: We're not trying to put you in
11:15:18 22 any kind of position to do that.

11:15:19 23 What I'm suggesting is, is that, for example, the
11:15:22 24 charge that they want, to me, would argue for us to be able
11:15:26 25 to offer some evidence from the prosecution history if the

11:15:31 1 Court excluded specifically the Graham reference where they
11:15:35 2 distinguish their patent over Graham by saying there was a
11:15:38 3 timing condition in the order of steps mattered. So if
11:15:42 4 that instruction was going to go in, which I don't think it
11:15:45 5 should, I know we're not arguing it, but we --

11:15:48 6 THE COURT: Well, that's exactly what you're
11:15:50 7 doing, you're arguing it right now.

11:15:51 8 MR. MELSHEIMER: We do have evidence -- I guess I
11:15:53 9 will say this, Your Honor, we will proffer the evidence
11:15:56 10 from the prosecution history that the Court has excluded
11:15:58 11 with respect to this Graham reference, and I'm happy to put
11:16:03 12 that in an offer of proof if that's a --

11:16:05 13 THE COURT: You can put whatever in your offer of
11:16:08 14 proof that you want to put outside the presence of the
11:16:10 15 jury, but I'm not going to tell you, because I don't know
11:16:12 16 at this point without having studied it further, whether
11:16:15 17 there's any merit to what this trial brief was filed at
11:16:18 18 6:00 a.m. this morning or not.

11:16:19 19 MR. MELSHEIMER: Understood. Understood, Your
11:16:21 20 Honor.

11:16:21 21 THE COURT: And I'm not going to take up the
11:16:23 22 charge piecemeal while the Defendant is still in its
11:16:26 23 case-in-chief, okay?

11:16:28 24 MR. MELSHEIMER: Okay. Understood, Your Honor.

11:16:30 25 THE COURT: All right?

11:16:30 1 MR. SHEASBY: Thank you, Your Honor.

11:16:31 2 (Bench conference concluded.)

11:16:40 3 THE COURT: Defendant, call your next witness.

11:16:41 4 MR. MELSHEIMER: May it please the Court, Your

11:16:42 5 Honor. At this time, Defendant, Wells Fargo, rests its

11:16:45 6 case.

11:16:45 7 THE COURT: All right. Ladies and gentlemen, the

11:16:51 8 Defendant has rested its case-in-chief.

11:16:53 9 Does Plaintiff have a rebuttal case to offer?

11:16:58 10 MR. SHEASBY: Your Honor, at this time, Plaintiff

11:17:02 11 calls Wells Fargo's executive Armin Ajami in its rebuttal

11:17:04 12 case by deposition.

11:17:04 13 THE COURT: Proceed with your rebuttal witness by

11:17:08 14 deposition.

11:17:08 15 MR. SHEASBY: Thank you, Your Honor.

11:17:13 16 (Videoclip played.)

11:17:18 17 QUESTION: Sir, can you state your full name for

11:17:20 18 the record?

11:17:20 19 ANSWER: Sure, Armin Ajami.

11:17:23 20 QUESTION: Where are you employed, sir?

11:17:24 21 ANSWER: Wells Fargo.

11:17:26 22 QUESTION: When did you begin to work for Wells

11:17:29 23 Fargo?

11:17:29 24 ANSWER: 2004.

11:17:30 25 QUESTION: What is your current position at Wells

11:17:32 1 Fargo.

11:17:32 2 ANSWER: I am a strategic planning manager.

11:17:35 3 QUESTION: So to be clear, you don't recall if you
11:17:37 4 were aware that USAA had launched a mobile check deposit
11:17:44 5 system at the time you were planning on launching one for
11:17:49 6 Wells Fargo, is that your testimony?

11:17:51 7 ANSWER: At the time -- yeah, I just -- I don't
11:17:54 8 remember. I know we found out about it later. I don't
11:17:56 9 know at the time, when they were about to make a decision
11:17:59 10 to start looking at it in late 2009, whether USAA was in
11:18:04 11 the market or not.

11:18:05 12 QUESTION: Sir, Wells Fargo examined USAA's mobile
11:18:11 13 check deposit application while it was designing its
11:18:14 14 system, yes or no?

11:18:14 15 ANSWER: Again, can you define "examined"?
11:18:20 16 Because what I'm saying is, we looked at the user
11:18:23 17 experience, so if that's your definition of examined, then
11:18:26 18 that's fine. But I don't know what you mean by examined.

11:18:27 19 QUESTION: Sir, under user experience, you mean
11:18:30 20 the operation of the app, correct?

11:18:32 21 ANSWER: No. No, it's the flow, the user
11:18:35 22 experience is how -- how the customer interacts with the
11:18:38 23 application.

11:18:40 24 QUESTION: You've looked at the USAA's mobile
11:18:43 25 check deposit application, correct?

11:18:44 1 ANSWER: The application itself? I don't recall.

11:18:48 2 We either got information through a third party, they had

11:18:52 3 publicly available information, or if it was available --

11:18:55 4 if someone had to have access to USAA's -- someone had to

11:19:00 5 have an account at USAA to see the USAA experience. That's

11:19:04 6 why I don't recall if someone actually did that, or we just

11:19:06 7 got it through the publicly available information that was

11:19:10 8 already out there and released through third parties.

11:19:12 9 QUESTION: You talked to Mitek about the USAA

11:19:14 10 system, fair?

11:19:15 11 ANSWER: No, we did not talk to Mitek directly

11:19:17 12 about USAA's system.

11:19:18 13 QUESTION: Why did you use the word "directly"?

11:19:20 14 ANSWER: I don't know. We didn't talk to Mitek

11:19:25 15 about USAA.

11:19:25 16 QUESTION: But you wanted people who used mobile

11:19:29 17 banking to continue to utilize ATMs and stores for check

11:19:35 18 deposits; is that correct?

11:19:36 19 ANSWER: Our position -- our view -- our viewpoint

11:19:41 20 was customers should choose whatever channel they want to

11:19:45 21 choose that's most convenient for them. Some people are

11:19:48 22 going to want to come into stores and branches, visit the

11:19:52 23 ATM. For some people self-service using a digital channel

11:19:55 24 like mobile makes the most sense. So ultimately, it's a

11:20:00 25 customer choice. We weren't forcing or incenting anyone to

11:20:03 1 use a mobile solution.

11:20:04 2 QUESTION: You told your managers that your
11:20:08 3 competitors embrace a mobile check deposit and made it,
11:20:14 4 quote, a table stakes capability, correct?

11:20:18 5 ANSWER: Correct, yeah.

11:20:20 6 QUESTION: You had very particular criteria for
11:20:22 7 choosing the type of mobile deposit system you were going
11:20:25 8 to use, fair?

11:20:26 9 ANSWER: That's fair.

11:20:27 10 QUESTION: You wanted one that was going to
11:20:28 11 provide the simplest experience possible, correct?

11:20:31 12 ANSWER: That's correct.

11:20:31 13 QUESTION: You wanted one that would provide the
11:20:33 14 high -- the lowest rate of exceptions and rejected checks,
11:20:39 15 correct?

11:20:39 16 ANSWER: I think -- yes, I think generally
11:20:40 17 speaking, yes.

11:20:41 18 QUESTION: Document, Exhibit 2, this business
11:20:44 19 strategy presentation on mobile check deposit was something
11:20:48 20 that evolved over a number of years, correct?

11:20:50 21 ANSWER: It did.

11:20:51 22 QUESTION: And in this document that evolved over
11:20:53 23 a number of years that you sent to your managers, the first
11:20:57 24 working mobile check deposit system that you identify in
11:20:59 25 this document to your managers was USAA's system, fair?

11:21:07 1 ANSWER: Sir, you said first working mobile
11:21:10 2 deposit system?
11:21:11 3 QUESTION: Yes.
11:21:12 4 ANSWER: I mean, the first one we knew of was
11:21:16 5 Mitek's solution that they had and they were talking about,
11:21:19 6 as a vendor trying to sell it --
11:21:19 7 QUESTION: Sure.
11:21:21 8 ANSWER: -- to banks, right? That's -- that's
11:21:23 9 what we knew of. USAA definitely showed up. So was it the
11:21:26 10 first one? I don't know.
11:21:27 11 QUESTION: And you also needed to make it highly
11:21:31 12 accurate. In other words, part of seamlessness is not just
11:21:34 13 that it's easy for the customer to use. Part of it is that
11:21:37 14 you get images of sufficient quality such that they can be
11:21:41 15 legally deposited, fair?
11:21:43 16 ANSWER: I think that's fair.
11:21:45 17 QUESTION: And those were both extremely high
11:21:47 18 priorities for you, fair?
11:21:48 19 ANSWER: They were definitely high properties.
11:21:51 20 QUESTION: In fact, seamlessness and success are
11:21:54 21 the two highest priorities that you were focused on --
11:21:58 22 ANSWER: You know, that's a good --
11:21:58 23 QUESTION: -- in terms of the quality of the
11:22:00 24 system?
11:22:00 25 ANSWER: That's a good question, I don't know if I

11:22:02 1 would actually say it that way. I would say the risk
11:22:05 2 component of the solution, not just the check acceptance
11:22:09 3 risk of the image but actually the new risk of the mobile
11:22:14 4 solution was going to introduce in the marketplace was
11:22:16 5 actually the No. 1 issue we were --

11:22:18 6 QUESTION: That's the fraud risk?

11:22:19 7 ANSWER: That's the fraud risk. I mean --

11:22:22 8 QUESTION: And it turns out that there is
11:22:24 9 essentially negligible fraud risk associated with mobile
11:22:28 10 check deposit, right?

11:22:28 11 ANSWER: No, I wouldn't -- I would not agree with
11:22:30 12 that. There is fraud risk associated with it, and we were
11:22:33 13 -- we're seeing like a duplicate deposit, right? So --

11:22:37 14 QUESTION: The Wells Fargo 2.0 mobile capture
11:22:41 15 system, you told your executives there was going to be an
11:22:45 16 increase in check capture success from 75 percent to
11:22:49 17 90 percent, correct?

11:22:50 18 ANSWER: Yes, that was our projection, to get to
11:22:53 19 90 percent.

11:22:53 20 QUESTION: And that was -- and that system that
11:22:57 21 you embraced, the Wells Fargo 2.0 system, was an auto
11:23:02 22 capture system, correct?

11:23:04 23 ANSWER: It was an auto capture system.

11:23:06 24 QUESTION: And by auto capture system, that means
11:23:09 25 there was autonomous assessment of the quality of the image

11:23:14 1 by the system, correct?

11:23:18 2 ANSWER: That's a good question. There -- I'm not
11:23:23 3 100 percent sure how it worked under the covers.

11:23:25 4 QUESTION: In other words --

11:23:26 5 ANSWER: Yeah.

11:23:26 6 QUESTION: -- when you were making the decision to
11:23:29 7 embrace auto capture for your mobile deposit system in
11:23:33 8 2013, you based that on the assessment that you would be
11:23:35 9 able to go from a 75 percent success rate --

11:23:39 10 ANSWER: Right.

11:23:40 11 QUESTION: -- to a 90 percent success rate?

11:23:43 12 ANSWER: That was one of the -- that was
11:23:45 13 definitely one of the features that was prominent in that
11:23:49 14 project.

11:23:49 15 QUESTION: You have no factual basis to disagree
11:23:52 16 with the Futurion statement that auto capture must now be
11:23:55 17 treated as a must-have feature across all strata of the
11:23:56 18 financial services industry, correct?

11:23:57 19 ANSWER: Yeah, I don't think I have any.

11:24:00 20 QUESTION: Now, I want to talk about the benefits
11:24:09 21 that are associated with mobile check deposit capture.

11:24:14 22 ANSWER: Uh-huh.

11:24:14 23 QUESTION: One of the benefits that's associated
11:24:16 24 with mobile check deposit capture is if you're successful
11:24:20 25 at capturing the check image, it's cheaper to deposit using

11:24:26 1 mobile check deposit for Wells Fargo than via an ATM or a
11:24:32 2 bank teller, fair?

11:24:35 3 ANSWER: Yes, we looked at all channels, and it
11:24:39 4 was cheaper -- the marginal cost was cheaper for mobile
11:24:43 5 deposit.

11:24:43 6 QUESTION: If you can answer my question yes or
11:24:46 7 no. As of January of 2011, your best estimate that you
11:24:55 8 were telling to your managers was if you were able to
11:25:00 9 successfully deposit an image using mobile capture, it
11:25:03 10 would cost you 46 cents. And if you couldn't do that, it
11:25:06 11 would be 82 cents through an ATM or \$2.55 through a teller.

11:25:12 12 ANSWER: Yes.

11:25:13 13 QUESTION: You told your superiors that there was
11:25:16 14 a dramatic shift in check deposit behavior after mobile
11:25:22 15 deposit adoption, correct?

11:25:23 16 ANSWER: There was -- yes, there was a dramatic
11:25:27 17 shift in check deposit behavior by the people who adopted
11:25:30 18 the service.

11:25:31 19 QUESTION: You told your superiors that over a
11:25:34 20 very, very short period of time --

11:25:36 21 ANSWER: Uh-huh.

11:25:37 22 QUESTION: -- there was a 15 percent decrease in
11:25:41 23 ATM usage and a 9 percent decrease in teller usage among
11:25:45 24 folks who use mobile check deposit.

11:25:47 25 ANSWER: Who adopted it. Yeah, I believe those

11:25:50 1 numbers are correct.

11:25:51 2 QUESTION: And those -- behavior shifting
11:25:56 3 continued over time, correct? It didn't plateau there.

11:26:00 4 ANSWER: That's a good question. It plateaued at
11:26:08 5 some point. It didn't go to zero. I think what we did
11:26:11 6 see, people continued to use all three channels, again,
11:26:14 7 based on whatever is convenient for the customer. But the
11:26:14 8 folks who did adopt mobile deposit, their incidence rate
11:26:14 9 and their time for using the ATM and there were checks that
11:26:23 10 were deposited --

11:26:23 11 THE REPORTER: I'm sorry.

11:26:25 12 ANSWER: The folks who adopted mobile deposit,
11:26:28 13 their usage of the ATM and teller line decreased over time,
11:26:32 14 and it did plateau at some point. I think you're referring
11:26:35 15 to some study we did, but I think if you looked at it
11:26:39 16 longer term, it didn't -- it didn't drop to zero, right,
11:26:42 17 their usage of ATM or tellers. It stopped at a certain
11:26:45 18 percentage.

11:26:46 19 QUESTION: When you're making the analysis for
11:26:48 20 mobile check deposit, one of the benefits you considered is
11:26:51 21 that it would grow the amount of deposits, correct?

11:26:54 22 ANSWER: It was -- it was one of the benefits we
11:26:55 23 considered.

11:26:57 24 QUESTION: When Wells Fargo was making the
11:27:00 25 decision -- the business decision to launch mobile deposit,

11:27:03 1 it concluded that a successful mobile check deposit capture
11:27:10 2 would be 20 cents and that an ATM would be more than double
11:27:15 3 the cost and that a teller would be more than 10 times the
11:27:18 4 cost. That was the basis under which it was making the
11:27:21 5 decision, fair?

11:27:22 6 ANSWER: At this time, May 2011, that's what we
11:27:27 7 were talking about. It may have been updated before a
11:27:30 8 final decision was made because we didn't launch the
11:27:33 9 product until May 2012, one year later. So this may have
11:27:38 10 evolved.

11:27:39 11 So when the final decision was made, it may have
11:27:43 12 been a different number, I don't know. But at this time,
11:27:46 13 in May 2011, is the number we were working with. This was
11:27:49 14 the assumption.

11:27:50 15 QUESTION: So if you were to give your best
11:27:53 16 testimony to the jury as to what was the cost differential
11:27:58 17 that Wells Fargo was viewing when it made the decision to
11:28:00 18 launch, it would be 20 cents for successful mobile check
11:28:04 19 capture, it would be more than double the cost for an ATM,
11:28:08 20 and be more than 10 times the cost for a teller deposit,
11:28:15 21 correct?

11:28:15 22 ANSWER: Well, according to this document, that's
11:28:17 23 what we're saying. And I'm not aware of anything else
11:28:19 24 after this --

11:28:19 25 QUESTION: Okay.

11:28:19 1 Answer: -- that we've seen.

11:28:20 2 QUESTION: So your views of the benefits of mobile

11:28:24 3 check deposit are, one, decrease in deposit costs, correct?

11:28:28 4 ANSWER: Correct.

11:28:30 5 QUESTION: Two, an expansion in deposits via an

11:28:35 6 expansion in customers, correct?

11:28:36 7 ANSWER: Potential -- we sort of listed it as a

11:28:39 8 potential expansion.

11:28:40 9 QUESTION: And that's -- and then, third, would be

11:28:42 10 what we're describing as this ecosystem effect, which it's

11:28:48 11 not just that they're depositing more money with you folks

11:28:50 12 but they're buying other products and services from you?

11:28:52 13 ANSWER: Potentially right. You deepen a

11:28:53 14 relationship with the customer. You earn their business.

11:28:54 15 QUESTION: When Wells Fargo employs mobile check

11:28:58 16 deposit --

11:28:58 17 ANSWER: Yeah.

11:28:59 18 QUESTION: -- it saves money, and it redeploys

11:29:02 19 that money to other areas of its business?

11:29:05 20 ANSWER: I think that's fair to say. Yeah, it

11:29:07 21 saves money and we're -- we apply those savings, right?

11:29:12 22 QUESTION: So as Wells Fargo's representative, you

11:29:16 23 can confirm that there were multiple communications by

11:29:20 24 USAA's representatives to Wells Fargo before this lawsuit

11:29:22 25 was filed, correct?

11:29:23 1 ANSWER: Yes, there is email, in-person meetings,
11:29:28 2 phone calls.

11:29:28 3 QUESTION: And the Wells Fargo lawyers who
11:29:30 4 received those communications were aware of the patents in
11:29:34 5 this case, correct?

11:29:36 6 ANSWER: They were aware of the patents that USAA
11:29:41 7 claims once USAA made the claim. They may -- they made a
11:29:49 8 broad announcement, right? USAA made a broad announcement
11:29:53 9 about patents they had in this space, publicly, and they
11:29:56 10 were aware of that at that time.

11:29:58 11 QUESTION: So as Wells Fargo's corporate
11:30:01 12 representative, you're testifying that on multiple
11:30:04 13 occasions before Wells Fargo launched its product, Wells
11:30:08 14 Fargo employees attended public presentations, industry
11:30:13 15 conferences where USAA was discussing its Mobile@Deposit
11:30:20 16 product?

11:30:20 17 ANSWER: Yes. Yeah.

11:30:21 18 QUESTION: Do you have data on whether mobile
11:30:27 19 check deposit has increased or decreased purchases or use
11:30:31 20 of other services and products at Wells Fargo.

11:30:33 21 ANSWER: Right. So do we have data on mobile
11:30:44 22 deposit, has it increased use -- purchase of other
11:30:48 23 products? I think -- I think the answer is no. No, I
11:31:00 24 think the only time we looked at anything was -- it was a
11:31:06 25 general sort of advanced analytics research on the early

11:31:11 1 adopter of mobile deposit, what they looked like, was it --

11:31:14 2 THE REPORTER: I just missed a word.

11:31:17 3 THE WITNESS: Sure.

11:31:18 4 THE REPORTER: Was a general sort of --

11:31:21 5 ANSWER: What we looked at was a general sort of
11:31:24 6 profile of -- of the early adopters of mobile deposit once
11:31:28 7 we launched, similar presentations which you showed earlier
11:31:35 8 with the -- the channel usage, the ATM and mobile and the
11:31:41 9 teller line. And in that research, we just looked at -- to
11:31:46 10 see, like, how many accounts do the early adopters have
11:31:50 11 with Wells Fargo versus people that didn't adopt.

11:31:52 12 So it's not exactly what you're asking for, but
11:31:55 13 we -- it was in the analysis. It was a general figure of
11:31:59 14 who was adopting the product. And typically, it was people
11:32:04 15 who were really engaged with the bank already are the ones
11:32:07 16 who were using the product.

11:32:09 17 I don't think there was anything else as far as --
11:32:14 18 anything about cross-selling or acquiring other products
11:32:16 19 after mobile deposit usage.

11:32:18 20 QUESTION: And you also know that mobile check
11:32:23 21 deposit is a table stakes requirement in today's banking
11:32:28 22 environment, fair?

11:32:29 23 ANSWER: Mobile deposit as a whole? Yeah, it's
11:32:32 24 now been established -- definitely it's table stakes.

11:32:36 25 QUESTION: And you also know that mobile deposit

11:32:39 1 is a way of making your customers stickier and more engaged
11:32:44 2 with you, fair?

11:32:45 3 ANSWER: I think mobile deposit is one of many
11:32:48 4 ways we try to engage customers.

11:32:50 5 QUESTION: Sir, in your presentations to
11:32:53 6 executives in 2011 and 2013, you quoted customers who said
11:32:58 7 they're going to leave Wells Fargo if we don't offer --

11:32:58 8 ANSWER: Sure.

11:33:02 9 QUESTION: -- mobile check database, correct?

11:33:03 10 ANSWER: Correct. And we get that all the time
11:33:06 11 for a lot of features. We don't know if they actually do
11:33:08 12 or not, but it was bubbling up as a service people wanted
11:33:11 13 to have.

11:33:11 14 QUESTION: It was not bubbling up. It was the No.
11:33:15 15 1 pain point among your customers in the mobile space when
11:33:20 16 you launched the feature.

11:33:23 17 ANSWER: Right.

11:33:23 18 (Videoclip ends.)

11:33:24 19 THE COURT: Does that complete this witness by
11:33:27 20 deposition?

11:33:27 21 MR. SHEASBY: It does, Your Honor.

11:33:28 22 THE COURT: All right. Plaintiffs, call your next
11:33:32 23 rebuttal witness.

11:33:32 24 MR. SHEASBY: Your Honor, Plaintiff, USAA, rests
11:33:35 25 its rebuttal case.

11:33:36 1 THE COURT: All right. Thank you.

11:33:38 2 Ladies and gentlemen of the jury, that means you

11:33:51 3 have now heard all the evidence in this case.

11:33:53 4 There are certain matters I need to take up with

11:33:55 5 counsel outside of your presence, and I suspect they will

11:34:00 6 take the majority of the rest of the day.

11:34:02 7 The good news is, that means lunch is waiting for

11:34:06 8 you in the jury room. And after lunch, you're free to

11:34:09 9 leave. As a matter of fact, if you'd rather not eat lunch

11:34:13 10 in the jury room and leave immediately, you may. Or you

11:34:16 11 may take it with you. It's up to you. I'm not going to

11:34:18 12 require your presence this afternoon or into the evening.

11:34:23 13 You're going to have the rest of the day off.

11:34:25 14 I am, however, going to ask you to be back in the

11:34:27 15 morning ready to go at the usual time that we've started

11:34:29 16 all week, which is 8:30.

11:34:32 17 Be sure, as you leave today, that you continue to

11:34:35 18 follow all the instructions I've given you about your

11:34:39 19 conduct. We are getting close to the end, and it is as

11:34:43 20 important now as it was Day 1 that you make sure that you

11:34:47 21 don't communicate with anyone in any way about the case,

11:34:50 22 including the eight of you.

11:34:52 23 I anticipate that when you're here in the morning,

11:34:56 24 the Court will be in a position to begin by giving you its

11:35:00 25 final jury instructions, which is often called the Court's

11:35:04 1 charge to the jury.

11:35:05 2 Following my final instructions to you, I
11:35:09 3 anticipate that the lawyers for both Plaintiff and
11:35:11 4 Defendant will then present their closing arguments. And
11:35:17 5 when you've heard closing arguments from counsel, then I
11:35:19 6 will instruct you to retire and deliberate on the verdict
11:35:23 7 form that will be presented to you.

11:35:24 8 Once you get to the jury room to begin your
11:35:27 9 deliberations, then things shift, and you go from not being
11:35:33 10 able to discuss the case with each other to being required
11:35:36 11 to discuss the case and the evidence that you've heard with
11:35:39 12 each other in light of my instructions and the questions in
11:35:42 13 the verdict form in an attempt to answer those questions
11:35:46 14 unanimously.

11:35:47 15 So please leave your juror notebooks on the table
11:35:50 16 in the jury room as you leave. You're welcome to stay for
11:35:53 17 lunch. I leave that completely up to you. Otherwise,
11:35:56 18 you're excused for the remainder of the day, and I will see
11:35:59 19 you in the morning.

11:36:00 20 The jury is excused at this time.

11:36:01 21 COURT SECURITY OFFICER: All rise.

11:36:03 22 (Jury out.)

11:36:29 23 THE COURT: Be seated, please.

11:36:30 24 Am I to understand that Defendants care to make an
11:36:37 25 offer of proof outside the presence of the jury?

11:36:39 1 MR. MELSHEIMER: Yes, Your Honor. And with the
11:36:42 2 Court's permission, Ms. Marcom and Mr. McCullough are going
11:36:50 3 to read in the offer of proof.
11:36:51 4 THE COURT: How long do you anticipate that will
11:36:52 5 take?
11:36:52 6 MR. MELSHEIMER: Five to ten minutes at most, Your
11:36:55 7 Honor.
11:36:55 8 THE COURT: All right. If you're prepared, let's
11:36:56 9 get that done now.
11:36:58 10 MR. MELSHEIMER: Thank you, Your Honor.
11:36:59 11 THE COURT: Defendant may now proceed to make its
11:37:00 12 offer of proof for the record.
11:37:01 13 MS. MARCOM: May it please the Court. Kate Marcom
11:37:17 14 for Wells Fargo.
11:37:18 15 THE COURT: Please proceed, Ms. Marcom.
11:37:20 16 MS. MARCOM: Pursuant to Rule 103 of the Federal
11:37:20 17 Rules of Evidence, Defendant, Wells Fargo Bank, tenders its
11:37:23 18 offer of proof regarding certain excluded evidence and
11:37:26 19 states as follows.
11:37:27 20 THE COURT: If you will please slow down as you
11:37:30 21 read.
11:37:30 22 MS. MARCOM: Wells Fargo offered evidence relating
11:37:32 23 to the cost to Wells Fargo to implement auto capture.
11:37:35 24 Specifically, Wells Fargo offered the testimony of Wells
11:37:38 25 Fargo employee Mr. Ajami, who testified during his

11:37:41 1 deposition that Wells Fargo paid no additional cost for the
11:37:45 2 licensee for auto capture.

11:37:46 3 THE COURT: And, again, I'm going to ask you to
11:37:47 4 slow down.

11:37:48 5 MS. MARCOM: Sorry. Sorry, Your Honor.

11:37:50 6 And that while there was an amendment to Wells
11:37:55 7 Fargo's licensing agreement with Fiserv for the MRDC auto
11:37:58 8 capture feature, there was no charge for it.

11:38:00 9 The Court excluded this testimony prior to trial,
11:38:03 10 starting on November 4th, 2019.

11:38:05 11 Wells Fargo offered the deposition testimony of
11:38:09 12 USAA employee Mr. Prasad, who testified that USAA was aware
11:38:13 13 that Wells Fargo used Mitek's Mobile Deposit Solution
11:38:17 14 around the 2011 to 2012 time frame. Mr. Prasad also
11:38:23 15 testified that Claim 1 of the '571 patent requires capture
11:38:26 16 of the image after the monitoring criteria has been
11:38:30 17 satisfied and that the '571 patent talks about monitoring
11:38:33 18 an image and having a set of monitoring criteria it looks
11:38:37 19 to for the image to pass and then captures the image.

11:38:40 20 The Court excluded this testimony prior to trial,
11:38:43 21 starting November 4th, 2019.

11:38:45 22 In its trial brief regarding USAA's opening the
11:38:49 23 door to evidence relating to other banks filed at Document
11:38:53 24 No. 312 in this case, Wells Fargo offered evidence
11:38:56 25 regarding the use of manual capture and auto capture by

11:38:59 1 other banks, including deposition testimony of Mitek
11:39:03 2 employees, Mr. Price and Mr. Fernandez.

11:39:08 3 Mr. Price's deposition testimony would have
11:39:09 4 established that it would be approximately 6100 financial
11:39:14 5 institutions deploying Mitek's MRDC software, fewer than
11:39:18 6 1,000 use auto capture.

11:39:20 7 Mr. Fernandez would have testified from his
11:39:22 8 firsthand knowledge that when Chase implemented auto
11:39:25 9 capture in 2018, it experienced a 3 percent improvement in
11:39:29 10 image acceptance rates.

11:39:30 11 Evidence would have also been offered that Chase,
11:39:32 12 using manual capture, accomplished over 20 million deposits
11:39:34 13 per quarter during the relevant time period of the
11:39:38 14 hypothetical negotiation and thereafter.

11:39:39 15 The Court denied Wells Fargo's trial brief on the
11:39:42 16 record on November 4th, 2019.

11:39:45 17 THE COURT: Ms. Marcom, please slow down.

11:39:47 18 MS. MARCOM: I'm sorry, Your Honor.

11:39:49 19 THE COURT: I know it's hard when you're reading,
11:39:51 20 but it's important that you slow down.

11:39:53 21 MS. MARCOM: Yes, Your Honor.

11:39:54 22 Prior to trial, Wells Fargo had offered additional
11:39:57 23 deposition testimony of Mr. Price which the Court excluded
11:39:59 24 on the record during the pre-trial conference dated October
11:40:03 25 28th, 2019.

11:40:03 1 The offered testimony related to the purchase
11:40:07 2 price for the MiSnap auto capture product, including that
11:40:11 3 for almost all of the 1,000 Mitek customers that use
11:40:16 4 MiSnap, there are no charges associated with MiSnap.

11:40:18 5 Mr. Price also testified that only nine or 10
11:40:23 6 companies pay Mitek directly for MiSnap, and that those
11:40:25 7 companies pay between 20 and \$40,000.00 per year.

11:40:29 8 During the pre-trial conference held on October
11:40:33 9 17th, 18th, and 21st, 2019, Wells Fargo offered multiple
11:40:38 10 pieces of evidence that were excluded by the Court.

11:40:40 11 Wells Fargo offered evidence relating to the
11:40:45 12 prosecution history regard -- regarding representations to
11:40:49 13 the Patent Office made by USAA which are relevant to a
11:40:52 14 number of issues, including Georgia-Pacific Factors 9 and
11:40:57 15 10.

11:40:57 16 Specifically, Wells Fargo offered evidence that in
11:41:01 17 the prosecution of the '571 patent, USAA acknowledged
11:41:05 18 Graham as a means for capturing images automatically that
11:41:09 19 differed from the specific method of auto capture claimed
11:41:12 20 in the asserted patents.

11:41:13 21 The Court excluded evidence relating to the
11:41:16 22 prosecution history in its decision to grant Plaintiff's
11:41:19 23 Motion in Limine No. 4.

11:41:20 24 Wells Fargo offered evidence regarding customer
11:41:25 25 satisfaction with and specific customer reviews of Wells

11:41:29 1 Fargo's Mobile Deposit product, which the Court excluded in
11:41:33 2 its decision to grant Plaintiff's Motion in Limine No. 7.

11:41:36 3 The evidence would have been introduced through
11:41:40 4 Ms. Margot Lockwood-Stein, who would have testified that
11:41:43 5 she and her team review customer comments received by Wells
11:41:47 6 Fargo relating to the mobile application and specifically
11:41:50 7 for the Mobile Deposit product.

11:41:52 8 Ms. Lockwood-Stein would testify that she and her
11:41:56 9 team used those customer reviews to analyze what customers
11:41:58 10 like and dislike about the product and to make decisions to
11:42:02 11 improve the customer experience and the product.

11:42:04 12 The offered evidence would have included such
11:42:08 13 example comments as: The auto capture feature never works
11:42:11 14 no matter how steady I try to be and give me the ability to
11:42:15 15 manually capture the image without messing with the
11:42:17 16 automatic capture. It totally screws up the experience.

11:42:21 17 This evidence would have been offered to show the
11:42:24 18 effect the comments had on Wells Fargo and how it motivated
11:42:28 19 Wells Fargo to make changes to the product, including the
11:42:31 20 decision to add the option for the customer to elect to
11:42:34 21 capture the image manually instead of by auto capture.

11:42:38 22 Wells Fargo offered evidence relating to Mitek
11:42:41 23 customers and their experiences implementing auto capture,
11:42:45 24 which the Court excluded in its decision to grant
11:42:47 25 Plaintiff's Motion in Limine No. 8.

11:42:49 1 The evidence would have been introduced through
11:42:51 2 Mr. Fernandez who would have testified from his firsthand
11:42:56 3 knowledge that when Chase implemented auto capture in 2018,
11:42:58 4 it experienced a 3 percent improvement in image acceptance
11:43:02 5 rates.

11:43:02 6 Mr. Fernandez would have also testified regarding
11:43:05 7 the rates that Santander and other Mitek customers
11:43:10 8 experienced when implementing auto capture.

11:43:12 9 Wells Fargo offered evidence related to Wells
11:43:17 10 Fargo's contracts with Fiserv and Carreker through the
11:43:17 11 accused systems and that Wells Fargo paid no additional
11:43:21 12 money when it received auto capture capability from its
11:43:25 13 vendor.

11:43:25 14 The Court excluded this evidence in its decision
11:43:27 15 to grant Plaintiff's Motion in Limine No. 10.

11:43:30 16 Wells Fargo offered evidence relating to patents
11:43:33 17 that Mitek owns in the mobile deposit capture space which
11:43:38 18 the Court excluded in granting Plaintiff's Motion in Limine
11:43:40 19 No. 2.

11:43:41 20 Wells Fargo offered evidence of USAA's licensing
11:43:45 21 efforts and the fact that no other bank has taken a license
11:43:49 22 to USAA's patents, which is relevant to Georgia-Pacific
11:43:52 23 Factor 3, 4, and 15 and the hypothetical negotiation
11:43:57 24 between the parties.

11:43:57 25 Specifically, Wells Fargo offered evidence

11:44:01 1 relating to USAA's discussions with third-party banks and
11:44:05 2 the views of those third-party banks regarding USAA's
11:44:08 3 patents.

11:44:09 4 Wells Fargo offered evidence that USAA sent
11:44:13 5 hundreds of letters to financial institutions in 2017
11:44:16 6 regarding its patent portfolio and invited recipients to
11:44:20 7 take a license to its patents.

11:44:22 8 Wells Fargo offered -- also offered evidence that
11:44:25 9 not one recipient of the letters had taken a license to
11:44:29 10 USAA's patents.

11:44:30 11 Wells Fargo offered statements from recipients of
11:44:33 12 the letters reflecting that the recipients questioned the
11:44:39 13 patentability and value of the technology. Wells Fargo
11:44:41 14 sought to introduce this evidence through the opinion of
11:44:42 15 its damages expert, Mr. Gerardi.

11:44:44 16 The Court excluded this portion of Mr. Gerardi's
11:44:47 17 report during a pre-trial conference on October 18th, 2019.

11:44:49 18 For the reasons stated on the record at the
11:44:52 19 pre-trial conferences, in open court, and in written
11:44:56 20 submissions, the foregoing evidence should have been
11:44:59 21 admitted into evidence.

11:45:00 22 Wells Fargo tenders this offer of proof and
11:45:02 23 describes the excluded evidence for the purpose of
11:45:04 24 compiling a complete evidentiary record.

11:45:07 25 In addition, Wells Fargo will make an offer of

11:45:09 1 proof regarding certain exhibits offered by Wells Fargo and
11:45:13 2 excluded by the Court during the pre-trial conference held
11:45:16 3 on October 21st, 2019, which Wells Fargo will file
11:45:20 4 separately on the docket and attach copies of the excluded
11:45:26 5 exhibits.

11:45:26 6 Thank you.

11:45:26 7 THE COURT: Does that complete your offer of
11:45:28 8 proof?

11:45:29 9 MS. MARCOM: Yes, Your Honor.

11:45:29 10 THE COURT: All right.

11:45:30 11 MR. MELSHEIMER: Thank you, Your Honor, for your
11:45:32 12 courtesies.

11:45:32 13 THE COURT: All right. Counsel, we're going to
11:45:34 14 recess for lunch. I'm going to reconvene at 1:30.

11:45:41 15 At 1:30, I will take up motions under Federal Rule
11:45:47 16 of Civil Procedure 50(a) that either Plaintiff or Defendant
11:45:48 17 care to offer.

11:45:49 18 Let me just say this to you. In a recent trial at
11:45:53 19 this juncture, I had a lawyer for one of the parties show
11:45:57 20 up and read a 35-page motion that they had prepared. I do
11:46:03 21 not anticipate listening to lawyers read 35-page motions at
11:46:08 22 1:30.

11:46:09 23 I anticipate hearing succinct and targeted oral
11:46:14 24 presentation as to the underlying substantive issues you
11:46:17 25 may choose to raise under the rule.

11:46:19 1 So with that, we stand in recess until 1:30.

11:46:24 2 MR. MELSHEIMER: May I ask one point of

11:46:26 3 clarification, Your Honor, about the -- are we then going

11:46:28 4 to move into the charge conference after -- I just want to

11:46:31 5 get a sense of --

11:46:32 6 THE COURT: After -- after I hear and deal with

11:46:34 7 motions under Rule 50(a), as I indicated earlier, during

11:46:38 8 pre-trial, I then intend to take up an informal charge

11:46:41 9 conference in chambers to discuss the areas of disagreement

11:46:44 10 on your latest submissions. After I've had the benefit of

11:46:49 11 fulsome input and discussion from all parties through their

11:46:53 12 counsel, I will take the time I believe necessary to factor

11:46:57 13 that in, and I will generate what I believe to be the

11:47:00 14 appropriate and proper final jury instruction and verdict

11:47:04 15 form. I will deliver that to counsel, provide you an

11:47:07 16 opportunity to review it. It should not take long because

11:47:12 17 you will all know where the points are of disagreement that

11:47:15 18 we talked about in the informal charge conference, and then

11:47:18 19 I will conduct a formal charge conference on the record

11:47:21 20 where either party may offer whatever objections for the

11:47:24 21 benefit of their client they feel that their client's

11:47:28 22 interest requires.

11:47:29 23 After we've completed the formal charge

11:47:32 24 conference, then we'll be prepared first thing in the

11:47:35 25 morning to bring in the jury. I will give them my final

11:47:38 1 instructions, and you will present your closing arguments.
11:47:40 2 I do not anticipate that we'll be prepared or ready for
11:47:43 3 closing arguments before tomorrow morning.

11:47:46 4 MR. MELSHEIMER: Understood, Your Honor.

11:47:46 5 THE COURT: Also, those of you that are going to
11:47:49 6 present closing arguments are not required to participate
11:47:53 7 in the informal or formal charge conference as long as that
11:47:58 8 is adequately staffed by your co-counsel. You're entitled
11:48:02 9 to use the intervening time to prepare for your closing
11:48:04 10 arguments tomorrow.

11:48:05 11 Do we know at this point who will be presenting
11:48:07 12 the closing arguments for the respective parties? I assume
11:48:11 13 you will for the Defendant.

11:48:12 14 MR. MELSHEIMER: Yes, Your Honor. Actually,
11:48:14 15 with -- with the Court's permission, Mr. Hill and I were
11:48:18 16 going to divide up the time we have been allotted by the
11:48:22 17 Court.

11:48:22 18 THE COURT: All right. What about for Plaintiff?

11:48:23 19 MR. SHEASBY: Your Honor, Mr. Bunt and I will also
11:48:26 20 be jointly speaking with your permission.

11:48:29 21 THE COURT: Well, you -- you four gentlemen are
11:48:32 22 not required to be here this afternoon if you would rather
11:48:36 23 use the intervening time for preparation purposes, and as
11:48:40 24 long as these matters are adequately staffed -- and there's
11:48:44 25 no doubt in my mind we have enough lawyers to cover

11:48:47 1 everything. If you want to be here and participate, you're
11:48:51 2 certainly welcome.

11:48:54 3 I would say during the informal charge conference,
11:48:57 4 this is often an opportunity for the younger lawyers to
11:49:00 5 have a participatory role, and I encourage you to include
11:49:04 6 all the members of your trial teams that are not preparing
11:49:07 7 for closing arguments in the informal charge conference.

11:49:10 8 With that, we stand in recess until 1:30.

11:49:12 9 COURT SECURITY OFFICER: All rise.

10 (Recess.)

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1 CERTIFICATION
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4 I HEREBY CERTIFY that the foregoing is a true and
5 correct transcript from the stenographic notes of the
6 proceedings in the above-entitled matter to the best of my
ability.

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8
9 /S/ Shelly Holmes _____
10 SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
11 Expiration Date: 12/31/20

11/5/19
Date

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